RECORD, CASE No. 15,412.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 1028.

WILLIAM H. McBROOM, PLAINTIFF IN ERROR,

vs.

THE SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY OF NEW MEXICO, LIMITED.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 Be it remembered that heretofore, to wit, on the 29th day of June, 1892, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of record: which said transcript is in the words and figures following, to wit:

Transcript of Record.

Pleas before the Honorable James O'Brien, chief justice of the supreme court of the Territory of New Mexico and judge of the fourth judicial district court thereof, at a regular term of said district court, begun and held in and for the county of San Miguel, at the court-house, in the town of Las Vegas, commencing on the 6th day of April, A. D. 1891.

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED). } No. 3486.

Be it remembered, that heretofore, to wit: on the *the* 24th day of September, A. D. 1889, the said plaintiff filed in the clerk's office of the fourth judical district for the Territory of New Mexico his declaration, which said declaration is in words and figures as follows, to wit:

Declaration.

TERRITORY OF NEW MEXICO, }
County of San Miguel. }

In the District Court of the Fourth Judicial District in and for the County of San Miguel, at the October Term, A. D. 1889.

To the Honorable Elisha V. Long, chief justice of the supreme court of said Territory and judge of the fourth judicial district court thereof:

The plaintiff, William H. McBroom, of the county of San Miguel, Territory of New Mexico, complains of the Scottish Mortgage
2 and Land Investment Company of New Mexico, (Limited), a foreign corporation doing business within the Territory of New Mexico, and having an office and place of business at Las Vegas, in the county of San Miguel aforesaid, and an agent residing thereat upon whom process may be served, of a plea that the said defendant corporation render to the said William H. McBroom the sum of twenty thousand dollars of lawful money of the United States, which the said defendant owes to the said plaintiff and unjustly detains from him; for that whereas, heretofore, to wit: on or about the 20th day of August, A. D. 1886, at the county of San Miguel aforesaid, the said plaintiff made his certain promissory note in writing, bearing date the day and year aforesaid, and then and there delivered the said note to the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), by which

said note, he, the said plaintiff, then and there promised to pay six years after date thereof, to the order of the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), sixty-five thousand dollars, gold coin of the United States of America, with interest thereon at the rate of twelve per cent. per annum, and the said interest thereon being further evidenced by seven several promissory notes made by the said plaintiff, and by him delivered unto the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), all bearing date the day and year aforesaid; one of said interest notes being for two thousand eight hundred and thirty dollars and ten cents, due December 31st, 1886, five of said interest notes being for seven thousand eight hundred dollars each, and payable respectively on the thirty-first days of December in the years 1887, 1888, 1889, 1890 and 1891, and one of said interest notes being for four thousand nine hundred and sixty-five dollars, due August 20th, 1892, by which said several interest notes the said plaintiff, on the day and year aforesaid, promised to pay, on the days when said notes respectively should become
3 due and payable as aforesaid, the said several sums of money aforesaid, to the order of the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), as and for the interest upon the said note first above mentioned, and although it was in and by the said principal note for the said sum of sixty-five thousand dollars, stated and recited that the same was for value received, and although the said note was made and executed as aforesaid for and on account of money loaned and advanced and by the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), to the said plaintiff, at and for the rate of interest aforesaid, yet the plaintiff in fact saith, that is was then and there exacted and required of the said plaintiff by the said defendant, that the said plaintiff, in consideration of the loaning to him by the said defendant of the said sum of sixty-five thousand dollars should pay unto the said defendant the sum of six thousand five hundred dollars, as and for discount and commission, in addition to and in excess of the said interest of twelve per centum per annum, as in the said principal note specified; and that afterwards, to wit: on the twenty-fifth day of September, A. D. 1886, at the county of San Miguel aforesaid, the said plaintiff did, pursuant to the aforesaid requirement, and in consideration of the said loan of the said sum of sixty-five thousand dollars, pay to the said defendant the sum of six thousand five hundred dollars, as and for a discount and commission upon and for the said loan, in addition to and in excess of the rate of interest of twelve per cent. per annum upon the said sixty-five thousand dollars, stipulated and reserved in the said principal note, and represented by the said several interest notes above mentioned; and the said defendant on the day and year last aforesaid, at the county of San Miguel aforesaid, did charge, collect and receive of and from the said plaintiff the said sum of six thousand five hundred dollars, by way of unlawful dis-
4 count, commission and agency, for the said defendant loaning and advancing to the said plaintiff, the said sum of

sixty-five thousand dollars, which said sum of six thousand five hundred dollars, so charged, collected and received by the said defendant, of and from the said plaintiff in manner and for the cause aforesaid, is in excess of and is a higher rate of interest than twelve per cent. per annum, contrary to the form of the statute in such case made and provided; whereby and by force of the said statute, the said defendant forfeited to the said plaintiff the sum of thirteen thousand dollars, being double the value of the said amount of six thousand five hundred dollars, so as aforesaid unlawfully charged, collected and received by the said defendant as aforesaid; and thereby an action hath accrued to the said plaintiff to demand and have, of and from the said defendant, the said sum of thirteen thousand dollars.

And whereas, also heretofore, to wit: on or about the 25th day of September, A. D. 1886, at the county of San Miguel aforesaid, the said plaintiff made his certain other promissory note in writing, bearing date the 20th day of August in the year aforesaid, and then and there delivered the said note unto the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), by which said note he, the said plaintiff, then and there promised to pay, six years after the date thereof, to the order of the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), sixty-five thousand dollars, gold coin of the United States of America, with interest thereon at the rate of twelve per cent. per annum; and although it was in and by the said note recited that the same was for value received, and although the said note was made and executed as aforesaid for and on account of money lent and advanced by the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), to the said plaintiff at and for the rate of interest aforesaid, yet the plaintiff in fact saith, that it was then and there required and demanded of the said plaintiff by the said defendant, that in consideration of the loaning to him by the said defendant of the said sum of sixty-five thousand dollars, he, the said plaintiff, should immediately repay and refund unto the said defendant the sum of six thousand five hundred dollars, as and for a discount and commission for the making of the said loan, in addition to the said interest of twelve per cent. per annum in and by the said note specified and reserved; and that afterwards, to wit: on the 25th day of September, A. D. 1886, at the county of San Miguel aforesaid, the said plaintiff did in pursuance of the aforesaid unlawful requirement pay unto the said defendant, the sum of six thousand five hundred dollars, as and for a discount and commission upon and for the said sum of sixty-five thousand dollars, so as aforesaid lent and advanced by the said defendant to the said plaintiff; and afterwards, to wit: on or about the 31st day of December, A. D. 1886, the said plaintiff did further pay unto the said defendant the sum of two thousand eight hundred and thirty dollars and ten cents for interest upon the said sum of sixty-five thousand dollars, so as aforesaid lent and advanced from the 20th day of August, A. D. 1886, to and until the 31st day of December, next following thereafter, the

said interest being at the rate of twelve per cent. per annum upon the said sum of sixty-five thousand dollars; and the said plaintiff therefore avers that the said defendant on the said 25th day of September, A. D. 1886, and the said 31st day of December, 1886, did unlawfully charge, collect and receive, of and from the said plaintiff, the said sum of six thousand five hundred dollars by way of unlawful discount, commission and agency, for the said defendant loaning and advancing to the said plaintiff the said sum of sixty-five thousand dollars, and the further sum of two thousand eight hundred and thirty dollars and ten cents, as and for interest upon the said sum of sixty-five thousand dollars from the 20th day of
6 August, 1886, to and until the 31st day of December, 1886, which said sums, amounting in the aggregate to nine thousand three hundred and thirty dollars and ten cents, so charged, collected and received by the said defendant of and from the said plaintiff, in manner and for the cause aforesaid, are in excess of and constitute a higher rate of interest than twelve per centum per annum upon the said sum of money so as aforesaid lent and advanced for and during the period aforesaid, contrary to the form of the statute in such case made and provided; whereby, and by force of the said statute, the said defendant forfeited to the said plaintiff the sum of eighteen thousand six hundred and sixty dollars and twenty cents, being double the value of the said several amounts so as aforesaid unlawfully charged, collected and received by the said defendant for and by means of interest, discount, commission and agency; and thereby and by force of the said statute an action hath accrued to the said plaintiff to demand and have in this behalf of and from the said defendant the sum of eighteen thousand six hundred and sixty dollars and twenty cents.

And whereas, also heretofore, to wit: on or about the 20th day of August, A. D. 1886, at the county of San Miguel aforesaid, the said plaintiff made his certain promissory note in writing, bearing date the day and year aforesaid, and then and there delivered the said note to the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), by which said note, he, the said plaintiff, then and there promised to pay, six years after the date thereof, to the order of the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), sixty-five thousand dollars, gold coin of the United States of America, with interest thereon at the rate of twelve per cent. per annum; and the said defendant, afterwards, to wit: on the 25th day of September, A. D. 1886, by means of a certain subterfuge in
7 the nature of discount, commission or agency, did unlawfully charge, receive and collect from the said plaintiff the sum of six thousand five hundred dollars as and for commission or discount upon and for the said sum of sixty-five thousand dollars in the said promissory note mentioned, and did afterwards, to wit: on or about the 31st day of December, 1886, charge, receive and collect, of and from the said plaintiff, the further sum of two thousand eight hundred and thirty dollars and ten cents, as and for interest upon the said sum of sixty-five thousand dollars,

from the 20th day of August, A. D. 1886, to and until the 31st day of December, next thereafter following; the said several sums and amounts being in the aggregate nine thousand three hundred and thirty dollars and ten cents, and being and constituting a higher rate of interest than twelve per cent. per annum upon the said sum of sixty-five thousand dollars for the period above mentioned, contrary to the form of the statute in such case made and provided; whereby, and by force of the said statute, the said defendant forfeited to the said plaintiff the sum of eighteen thousand six hundred and sixty dollars and twenty cents, being double the amount of the said several sums so as aforesaid unlawfully charged, collected and received by the said defendant as aforesaid; and thereby and by force of the said statute an action hath accrued to the said plaintiff to demand and have in this behalf of and from the said defendant the said sum of eighteen thousand six hundred and sixty dollars and twenty cents.

Yet the said defendant, though often requested so to do, hath not as yet paid the said sum of twenty thousand dollars above demanded, or any part thereof, to the said plaintiff, but to pay the same has thereby refused and still doth refuse, to the damage of the said plaintiff of twenty thousand dollars, and therefore he brings his suit and prays judgment against the said defendant for the said sum of twenty thousand dollars above demanded together
8 with interest thereon and the costs of this suit.

FRANK SPRINGER,
Attorney for Plaintiff.

And afterwards, to wit: on the 31st day of October, A. D. 1889, there was filed in the office of the said clerk pleas of defendant in words and figures as follows, to wit:

District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

W. H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY, ETC. } No. 3486.

And the defendant, by William A. Vincent, its attorney, comes and defends the wrong and injury when, etc., and says that it does not owe the said sum of money above demanded, or any part thereof, in manner and form as the plaintiff has above complained against it, and of this the defendant puts itself upon the country, etc.

WM. A. VINCENT,
Attorney for Defendant.

And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against it, the defendant, because it says, that the several supposed causes of action in the said declaration mentioned did not, nor did any of them, accrue to the plaintiff at any time within three years next before

the commencement of this suit, in manner and form as the plaintiff has above complained against the defendant. And this the defendant is ready to verify; wherefore it prays judgment if the plaintiff ought to have his aforesaid action against it, etc.

WM. A. VINCENT,
Attorney for Defendant.

And afterwards, to wit: on the 11th day of November,
9 A. D. 1889, there was filed in the office of the said clerk a replication, which said replication is in words and figures as follows, to wit:

In the District Court of San Miguel County, October Term, A. D. 1889.

W. H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY, ETC. } No. 3486.

And the said plaintiff as to the said first plea of the said defendant, wherein it puts itself upon the country, doth the like.

FRANK SPRINGER,
Attorney for Plaintiff.

And the said plaintiff as to the said plea of the said defendant by it secondly above pleaded, says *precludi non*, because he says that the said several causes of action in the said declaration mentioned and each and every one of them, did accrue to the said plaintiff within three years next before the commencement of this suit, in manner and form as the said plaintiff hath above thereof complained against the said defendant, to wit: at the county of San Miguel aforesaid. And this the said plaintiff prays may be inquired of by the country, etc.

FRANK SPRINGER,
Attorney for Plaintiff.

And afterwards, to wit: on Wednesday, April 29th, A. D. 1891, the same being the twenty-first day of the April term of the district court, held within and for the county of San Miguel and Territory of New Mexico, the following among other proceedings were had, to wit:

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY (LIMITED). } No. 3486. Debt.

10 Comes now the plaintiff in the above-entitled cause, by his attorney, Frank Springer, Esq., and comes also the defendant by its attorneys, Messrs. E. A. Fiske and A. A. Jones, and issue having heretofore been joined, now comes the following jury, to wit:

Jose Garcia,	Bernardino Arias,
Fernandez Jimenez,	Jesus Serna,
Antonio Montoya,	Domingo Montoya,
Matias Aragon,	Trinidad Sena,
Jose Chavez y Chavez,	Pablo Medina,
Jose de la Cruz Pino,	Eduvijen Patron,

twelve good and lawful men, of the body of the county, who are duly sworn the truth to speak upon the issues joined between the said parties, hear part of the evidence and under the instructions retire until to-morrow morning at nine o'clock.

And afterwards, to wit: on Thursday, April 30th, 1891, the same being the twenty-second day of said term of court, the following among other proceedings were had, to wit:

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY. } No. 3486. Debt.

Now come the parties in the above-entitled cause, by their respective attorneys, and comes also the jury heretofore empanneled, who hear additional evidence, and under the instructions of the court retire until to-morrow morning at nine o'clock.

And afterwards, to wit: on Thursday, April 30th, A. D. 1891, the same being the twenty-second day of said term of court, the following among other proceedings were had, to wit:

11 WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY. } No. 3486. Debt.

Comes now the defendant by its attorneys, Messrs. Fiske and Jones, and files motion to instruct the jury for the defendant, and the court after hearing counsel on said motion, and being sufficiently advised in the premises denies said motion, to which the defendant excepts.

And afterwards, to wit: on Friday, May 1st, A. D. 1891, the same being the twenty-third day of said term of court, the following among other proceedings were had, to wit:

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY. } No. 3486. Debt.

Now come the parties in the above-entitled cause, by their respective attorneys, and comes also the jury heretofore empanneled, who hear the balance of the evidence, arguments of the respective counsel, instructions of the court, and under the charge of a sworn

bailiff retire to deliberate upon their verdict, and after due deliberation return into court their verdict in the following words and figures, to wit:

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED). } No. 3486. Debt.

We, the jury, find for the plaintiff, and assess his damages at the sum of thirteen thousand dollars, ($13,000).

FERNANDEZ JIMENEZ, *Foreman.*

12 And the jury also files the special findings which are in words and figures as follows, to wit:

District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED). } No. 3486. Debt.

Particular questions of fact to be found by the jury in the above-entitled cause:

First. State whether or not the defendant company ever received any part of the six thousand five hundred dollars paid by plaintiff McBroom to George J. Dinkel?

A. Yes.

Second. State whether or not you find that George J. Dinkel ever paid any of the six thousand five hundred dollars received by him to the defendant company?

A. Yes.

Third. State whether or not at the date of the institution of this suit, plaintiff McBroom had paid any part of the sixty-five thousand dollars, or any interest thereon, and if so, how much?

A. Yes. Two thousand nine hundred and ninety-two dollars.

FERNANDEZ JIMENEZ, *Foreman.*

And afterwards, to wit: on Saturday, May 2d, A. D. 1891, the same being the twenty-fourth day of said term of court, the following among other proceedings were had, to wit:

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY (LIMITED). } No. 3486. Debt.

13 Come now the parties to the above-entitled action by their respective attorneys and the defendant by its attorney, moves the court for judgment, notwithstanding the verdict, because it is inconsistent with the special findings, etc., and the court after hear-

ing the said motion denies the same, to which the defendant excepts. Defendant gives notice of motion for a new trial.

And afterwards, to wit: on Saturday, May 2d, A. D. 1891, the same being the twenty-fourth day of said term of court, the following among other proceedings were had, to wit:

WILLIAM H. McBROOM *vs.* THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED).	Debt. No. 3486.

Comes now the plaintiff by his attorney, Frank Springer, Esq., and asks the court for a judgment on the verdict heretofore rendered and entered in the above-entitled cause; and the court being fully advised in the premises:

It is thereupon considered and adjudged by the court that the plaintiff, William H. McBroom, Esq., do have and recover of and from the defendant, The Scottish Mortgage and Land Investment Company of New Mexico (Limited), the sum of thirteen thousand dollars ($13,000), together with all the costs of this proceeding to be taxed, and that execution issue therefor.

And afterwards, to wit: on Saturday, May 16th, A. D. 1891, the same being the thirty-sixth day of said term of court, the following among other proceedings were had, to wit:

WILLIAM H. McBROOM *vs.* THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED).	No. 3486.

14 Comes now the defendant by its attorneys, Messrs. Fiske and Jones, and files motion for a new trial, which said motion is in words and figures as follows, to wit:

In the District Court for the County of San Miguel, Territory of New Mexico, April Term, A. D. 1891.

WILLIAM H. McBROOM *vs.* THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED).

Now comes the defendant in the above-entitled cause and moves the court here to set aside the verdict of the jury in the above-entitled cause and for a new trial, because—

First. The court erred in admitting illegal, improper and incompetent oral testimony of witnesses, documents and papers offered and submitted to the jury in said cause by said plaintiff and in his behalf over the objections then and there made by the defendant to the admission of said testimony, documents and papers as evidence in said cause.

Second. The court erred in excluding from the jury in said cause legal, proper and competent testimony and documentary evidence offered in evidence by the defendant in its behalf upon the trial of said cause.

Third. The court erred in refusing to give to the jury in said cause legal and proper instructions as to the law of the case which were duly submitted and asked for by the said defendant.

Fourth. The court erred in giving to the said jury as the law of the case instructions of its own motion.

Fifth. The court erred in giving to the jury as the law of said cause instructions asked for by the plaintiff in said cause.

Sixth. The court erred in neglecting to instruct the jury fairly as to the law of said case.

15 Seventh. The court erred in neglecting to instruct the jury in said cause fully as to the law of said case.

Eighth. The court erred in overruling the motion of defendant made at the close of the testimony and evidence offered by the plaintiff, and after the said plaintiff had closed and rested his case, in which said motion the defendant moved the court to instruct the jury to find a verdict for the said defendant.

Ninth. The court erred in overruling defendant's motion, made after all the evidence had been submitted to the jury, for the court to instruct the jury to find a verdict for the defendant

Tenth. The verdict is contrary to the law of said case.

Eleventh. The verdict is contrary to the legal evidence and the weight of the legal evidence in said case.

Twelfth. The damages assessed against said defendant by the jury in and by their said verdict are excessive.

Thirteenth. The court erred in overruling defendant's motion for judgment on the special finding of facts by the jury notwithstanding their general verdict.

Fourteenth. And for other and sufficient reasons apparent.

EUGENE A. FISKE.
JOHNSON, VINCENT & JONES,
Attorneys for Defendant.

And the court after hearing said motion denies the same, defendant excepting.

Comes again the defendant, by its attorneys, and makes application for an appeal in the above-entitled cause; and it is thereupon considered and adjudged by the court that the said appeal be and hereby is granted upon the defendant filing affidavit and appeal bond as required by law.

16 And afterwards, to wit, on Saturday, May 16th, A. D. 1891, the same being the thirty-sixth day of said term of court, the following among other proceedings were had, to wit:

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED).

Come now the parties to the above-mentioned cause by their respective attorneys, and the court being fully advised grants the defendant until July 10th, 1891, to prepare and file bill of exceptions.

And afterwards, to wit: on the — day of June, A. D. 1891, the said defendant filed in the office of the said clerk a bill of exceptions in said cause, which is in words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of San Miguel. }

In the District Court for the Fourth Judicial District in and for the County of San Miguel

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED). — Debt. No. 3486.

The defendant in the above-entitled cause proposes the following as the record and bill of exceptions upon which the judgment of the district court therein may be reviewed by the supreme court of the Territory of New Mexico:

1. The declaration.
2. Pleas filed October 31st, 1889.
3. Replication filed November 11th, 1889.
4. Record entry of trial and verdict of jury.
5. Motion for judgment on special findings.
17 6. Record entry of order denying it.
7. Motion for new trial.
8. Record entry of order denying it.
9. Record entry of judgment upon the verdict.
10. The following bill of exceptions.

Bill of Exceptions.

TERRITORY OF NEW MEXICO, }
County of San Miguel. }

In the District Court for the Fourth Judicial District in and for the County of San Miguel, April Term, 1891.

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED). — Debt. No. 3486.

Be it remembered, that on the trial of the above-entitled cause, at the regular April term of said court, on the 29th day of April, A.

D. 1891, before the Honorable James O'Brien and a jury, the following evidence was introduced, to wit:

In the District Court for the Fourth Judicial District, Sitting within and for the County of San Miguel, Territory of New Mexico, April Term, A. D. 1891.

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED). } No. 3486.

This cause was tried before Chief Justice O'Brien and a jury, April 29th, 1891.

Appearances: For plaintiff, Mr. Frank Springer; for defendant, Messrs. A. A. Jones, Eugene A. Fiske.

18 *Plaintiff's Case.*

Jury called and sworn to try the case.

(Mr. FISKE to the court:) We desire to dismiss in this case the plea of the set-off as pleaded by us as part of our defense.

(The COURT:) Your request is granted, there being no objection.

Opening statement of plaintiff's case made to the jury by Mr. Frank Springer.

At the close of Mr. Springer's opening statement of the case to the jury Mr. Fiske addressed the jury as follows:

(Mr. FISKE:) Gentlemen of the jury: I am not going to open our side of the case now. I simply want to request you to keep your minds open on the subject because we say the facts are very different from those stated by Mr. Springer. That for instance, in the one item of bonus paid, that this company never authorized or received a single cent, and many other things which we entirely disagree with the plaintiff as to the facts. Just keep your minds open until you hear the testimony.

(Mr. SPRINGER:) I submit that the address made by counsel constitutes an opening of his case, and I shall object to his opening it any further.

Testimony of Wm. H. McBroom.

WILLIAM H. McBROOM, sworn.

Direct examination by Mr. FRANK SPRINGER:

1. What is your name?
Ans. William H. McBroom.
2. Are you the plaintiff in this case?
A. Yes, sir.

3. Do you know The Scottish Mortgage and Land Investment Company of New Mexico (Limited,) the defendant in this case?

A. Yes, sir.

19 4. Did you ever have any dealings with the defendant in regard to a loan of money in the year 1886?

A. Yes, sir.

5. State whether or not during that year you made a loan of money from that company?

A I did.

6. For what amount?

A. Sixty-five thousand dollars.

7. At what date did you obtain such loan of sixty-five thousand dollars.

Objected to by Mr. Fiske, of counsel for defendants, on the ground that the declaration states the note was made on the 20th of August, 1886; that this loan was then consummated, and that is the contract that must be relied upon in this case. Counsel object to his proving a different contract from the one set out in the declaration, by showing the loan was made in September, when the declaration charges it to be made August 20th, 1886.

Objection sustained by the court.

(Mr. SPRINGER to witness:)

8. Go on and state to the jury what negotiations you had in reference to the loan of $65,000, that you spoke of, and all the facts and circumstances in connection with it?

A. I first made an application to Mr. Dinkel, I cannot remember the date exactly, but it was along about the 1st of June, 1886, but I would not be certain.

9. Who was Mr. Dinkel?

A. The Scottish loan agent here.

Counsel for defendant object to the witness stating that Mr. Dinkel was the agent unless he shows he knows it.

(The COURT:) You can cross-examine him on that point.

Exception reserved by defendant's counsel.

A. He asked me what was the amount I wanted, and I told him I needed about $65,000. He says, "That is more than our

20 company authorizes me to loan, they would not loan only from $25,000 to $30,000; that is what they have authorized me to loan to an individual," and for that reason he said he would not be able to let me have it.

Counsel for defendant object to all conversations which witness had with Dinkel, and all that Dinkel told him, on the ground that the same is hearsay.

Objection overruled by the court.

Exception reserved by defendant's counsel.

(WITNESS:) So I dropped trying to get the loan from that direction, but kept making an effort to get it from other sources; and

some time later again, I could not give the date exactly, but along in July I rather think, Mr. Dinkel opened the subject again himself to me by saying, "Mac, I believe our company can be induced to make that loan to you; the difficulty is the large sum you want." He says, "Now, in addition to the interest, what would you be willing to give us?"

(Mr. FISKE:) I desire it to be understood, so that there will be no mistake about it, that all this testimony goes in over our objection and exception.

(The COURT:) All this testimony is over your objection and exception.

(WITNESS:) "What will you be able to give them in addition to the interest, to make this inducement to them to make the loan to you?" After studying the matter for some time, and discussing it with him, I concluded to give a one-eighth interest in the ranch, besides the interest on the money.

(Mr. JONES, of counsel for defendant:) We object to this testimony on another ground, and that is that the contract that he is testifying in regard to now was never consummated, or the proposition he has stated was never carried out, and has no connection with the transaction as it finally shaped itself, and there is no allegations in the declarations in reference to any of these propositions. We
21 insist he shall confine himself to the particular transaction as it actually occurred, and we object on the further ground that the testimony is immaterial and irrelevant and incompetent.

Objection overruled by the court.

Exception reserved by defendant's counsel.

(WITNESS:) This was satisfactory to Mr. Dinkel, the agent of the Scotch people, and was accepted by him. The interest at that time agreed upon between us was either ten or twelve per cent., I have forgotten which. I had occasion then to leave town for awhile, and Dinkel said, "I have not got the money all here now, but I think it can be soon gotten here. I will have it here by the time you get back." Soon after I got back Dinkel says to me, "Now, I have turned over all this one-eighth interest to the Scotch people. I have done a good deal for you, now you ought to be able to do something for me. They will not divide this one-eighth with me I have turned over to them, and you ought to do something for me." This was discussed by us for several days, I think, and I finally consented to give him one other one-eighth interest, which he said was to be for himself. This second one-eighth he said was to be for himself, but he informed me soon afterwards that he had also given that to the Scotch people, and he showed me letters from the Scotch people——

(Mr. FISKE:) Have you got those letters or do you know anything about them?

A. No, sir.

Counsel for defendant objects to witness testifying as to the contents of the letters.

Objection sustained.

(WITNESS:) I consented to give the second one-eighth interest which went to Dinkel, but he soon informed me that he had turned that over to the Scotch people also; and a short time after I agreed to give the second one-eighth to him, I got to studying the matter over and I concluded it was too much to give, that I could
22 not afford to do it, and I went to Mr. Dinkel and told him I would withdraw that agreement as to giving any interest in the ranch at all, but that I would give him in place of the one-eighth interest which went to the Scotch people, or the whole thing, that I would give in place of the one-fourth interest I had given, $6,500 in cash, to take the place of what I had offered the Scotch people, and that I could pay twelve per cent. interest and take the loan as agreed upon. This he refused to do. He said I was not treating him right, or the Scotch people right, and that he would not consider the proposition. Well, soon after this, in addition to the $6,500, which was to go to the Scotch people, I offered him $2,000 in notes, which was to be his own. This was not accepted right away, but the loan was finally accepted on those terms, and the loan made to me of $65,000 on the 25th day of September——

Counsel for defendant object to the witness giving any date different from the date in the declaration, and ask that the latter part of the answer of the witness as to the date of payment be taken from the jury.

(The COURT:) I will allow the answer to go as it is, and I will simply hold the ruling in abeyance until I hear from Mr. Springer on the subject.

Exception reserved by defendant's counsel.

(WITNESS:) On the 25th day of September, or when Mr. Dinkel accepted this contract on those terms, which was that I was to date the note back to the 20th of August.

Counsel for defendant object to the statement of witness.

(The COURT to Mr. Springer:) If it is a fact that the notes were not delivered to the company until the 25th day of September, and you desire to amend your declaration to show that the notes were not delivered until that time, you may do so.

23 (Mr. SPRINGER:) If your honor thinks it is material I will amend the declaration by stating that the notes were made September 25th, 1886, and dated August 20th, 1886.

Counsel for defendant object to the declaration being amended, on the ground of surprise to the defendant, and not being prepared to meet that point.

Objection overruled by the court.

Exception reserved by defendant's counsel.

(WITNESS:) On the 25th day of September, I got the loan from

him of $65,000, and I gave the Scotch agent, Mr. Dinkel, I don't remember exactly who the check was given to, Mr. Dinkel and Mr. Vincent were both present, and it was delivered to one of them. I delivered them $6,500 in cash and two thousand dollars in notes. The notes were given to Mr. Dinkel, and the notes were dated back until the 20th of August.

10. This $6,500, how was that paid?

A. It was paid in a check. I can't remember exactly, but to the best of my recollection the $65,000 was paid in this way. There was one check drawn in favor of the First National Bank of Las Vegas, another one drawn to Lehman Spiegelberg, of Santa Fé, or the Second National bank, and the third check of $6,500 was paid to Dinkel, the Scotch agent.

(Mr. FISKE, of counsel for defendant:) We object to all this proof about how this matter was done. The best proof of that is the checks themselves, and unless I am greatly misinformed, they show a very different state of facts.

Objection overruled by the court.

Exception reserved by defendant's counsel.

(Mr. FISKE:) I move that all the witness has said on that point be taken from the jury.

Motion overruled.

Exception reserved by defendant's counsel.

11. The $65,000 for which you gave your note was received by you in what form?

24 A. In the way I am stating. One check, to the best of my recollection, was drawn to the First National Bank of Las Vegas, here. To the best of my recollection it was drawn in my favor, and on the back of it, "Pay to the First National bank," and the same with the check that went to the Second National Bank of Santa Fé, and the $6,500 check, I just simply signed it in blank on the back; that is, it was not made payable to anybody; it was simply signed in blank, that is, to the best of my recollection.

12. Whose check was that? What check was it?

A. That was the Scottish Company's check.

13. These several checks you have mentioned, state whether or not they were checks of The Scottish Mortgage and Land Investment Company, the defendant here?

A. They were all three Scottish mortgage checks.

14. Were those the checks that were delivered to you by Mr. Dinkel.

A. Mr. Jefferson Raynolds was present——

15. Where did you get those checks? Please explain where you got them?

A. The First National bank check and the check that went to the Second National bank at Santa Fé were delivered to Mr. Raynolds in my presence, and he was authorized to see that the Second National bank debt was paid.

16. Authorized or directed by whom?

A. By the Second National bank so I am informed; and this $6,500 Scottish Company check, Mr. Dinkel or Vincent had in his hands, and said, "Here, McBroom, sign this," and I signed it in blank on the back, and handed it to them, or whoever had it, kept it in his hands all the time, or kept his hands on it all the time. I signed it and handed it right back to them.

17. These three checks you have mentioned, did they make up the amount of $65,000?

25 A. No, sir. The balance of the $65,000 was placed to my credit in the First National Bank of Las Vegas.

18. State whether or not as a part of the $65,000 you received from the Scotch company on this loan, you received this check of $6,500?

A. Yes, sir, it was received by me. I endorsed it and passed it right back.

19. That is the check you passed back to Mr. Dinkel?

A. Yes, sir, the sum that was agreed upon I should pay the Scotch people for that loan.

20. Then, as I understand you to say, the money for this loan was turned over to you in the form of three checks, and the balance placed to your credit at the bank?

A. Yes, sir.

21. These checks being payable to your order?

A. Yes, sir.

22. And that you endorsed the $6,500 check and handed it back to the manager of the Scotch company?

A. Yes, sir.

23. Now, state to the jury what you handed him back that $6,500 check for.

Counsel for defendant object to all the foregoing questions asked of the witness.

Objection overruled.

Exception reserved by defendant's counsel.

A. It was part of the consideration of getting the loan from the Scotch people.

24. State whether or not that was in pursuance of the agreement you had made with Mr. Dinkel?

Objected to by defendant's counsel as leading.

Objection overruled by the court.

Exception reserved by defendant's counsel.

A. Yes, sir, with Mr. Dinkel, the Scotch agent.

26 25. State, Mr. McBroom, at what place or what office were these transactions and negotiations between you and Mr. Dinkel carried out?

A. It was in part of the building known as the "Tamme building," where Mr. Dinkel had his office. The Scotch company had an office there then

26. Who was professing to be in charge of the business of the Scottish Mortgage and Land Investment Company?

Objected to by defendant's counsel as leading and incompetent.
Objection overruled.
Exception reserved by defendant's counsel.

A. Mr. Dinkel.
27. What was his first name?
A. George J. Dinkel, I believe.
28. Do you know what his official title was in connection with the business of the Scottish Company?

Objected to by defendant's counsel.
Objection overruled by the court.
Exception reserved by defendant's counsel.

A. Yes, sir.
29. State what it was?
A. Manager of the Scottish Mortgage and Land Investment Company.
30. Now, going back again to these checks and money deposited to your credit for $65,000, I will ask you whether that was the manner in which the loan was paid to you by the Scotch company?

Objected to by defendant's counsel on the ground that witness has already answered the question and that the same is leading.
Objection overruled by the court.
Exception reserved by defendant's counsel.

(WITNESS:) I do not understand the question.
31. Was that the manner in which you received the loan from the Scotch company, by means of checks and the money placed to your credit in the bank?

27 Objected to by defendant's counsel because the same is leading, and on the ground that the witness has already answered the question.
Objection overruled by the court.
Exception reserved.

A. Yes, sir.
32. State whether during that negotiation Mr. Dinkel said anything about referring the question to the directors of the company in Scotland?

Objected to by defendant's counsel as hearsay, incompetent and immaterial.
Objection overruled.
Exception reserved by defendant's counsel.

A. Yes, sir.
33. Well, what did he inform you about that?

Objected to by Mr. Fiske, of counsel for defendant, as incompetent and immaterial.
Objection overruled by the court.
Exception reserved by defendant's counsel.

(Mr. JONES, of counsel for defendant:) We object on another ground as to any of the testimony as to what the agent said, and that ground is this: In so far as the testimony undertakes to deal with the declaration of Mr. Dinkel with reference to this usurious part of the loan, we object because it must first be shown affirmatively that the company directly authorized Dinkel to enter into the illegal transaction by taking this usurious money, and that before any statements of Mr. Dinkel in reference to any illegal transaction are given, it must first be shown that he was especially authorized to perform that transaction for the company, and in the absence of that special authority, no declarations of his in reference thereto are competent.

Objection overruled by the court.
Exception reserved by defendant's counsel.

34. (Mr. SPRINGER to witness:) Well, what did he inform you about that?

28 A. He told me he had written them, placing my request for a loan before them, and informing them what interest I would pay, and what I had offered to give for it.

Counsel for defendant object to the answer of witness and moves that the same be stricken out on the ground that the same is double hearsay.
Objection overruled.
Exception reserved by defendant's counsel.

35. (Mr. SPRINGER to witness:) Now, go on, and state what you started to tell.

Objected to by defendant's counsel on the ground that the testimony is incompetent, hearsay and immaterial and not the best evidence.
Objection overruled.
Exception reserved by the defendant.

36. The question is what Mr. Dinkel told you with reference to his communications to the Scotch people concerning this loan to you. Tell the jury all he told you with reference to it, as to his submitting it to them, and what instructions they gave him in regard to it?

Objected to by counsel for defendant for reasons above stated.
Objection overruled.
Exception reserved.

A. Mr. Dinkel, the agent, told me that he had submitted my request for a loan to them, and what inducements I had offered for it, and he told me soon afterwards that they had accepted it, and he showed me telegrams and read me letters.

Counsel for defendant object to the witness stating anything about any letters.
Objection sustained.

37. State what Dinkel told you, if anything, with reference to the directors of the Scotch company accepting the proposition for the loan as you made it with him as agent?

A. He told me they had agreed to make the loan on those conditions.

38. Did he say anything to you as to whether he had advised them in regard to the $6,500 bonus?

Objected to as leading.
Objection overruled.
Exception reserved.

A. He was always representing to me what he was getting was going directly to the Scotch company.

39. What I want to know is, what, if anything, he told you as to his advising the directors of the Scotch company about his arrangement with you for the $6,500 bonus?

A. The $6,500 bonus was given after I had withdrawn my agreement.

40. Please pay attention to my questions. What I want to know is what Mr. Dinkel told you about his communications with the directors of the Scotch company on the subject of the bonus, of accepting the bonus from you?

Counsel for defendant object to the question on the ground that the same is leading.
Objection overruled.
Exception reserved.

A. He told me he had written to them advising them to make the loan, and the bonus he was getting, and he showed me letters from them in which they approved the taking of it.

Counsel for defendant object to answer of witness and ask that what he says with regard to the contents of the letters be taken from the jury.

(The COURT:) The latter part of the witness' answer is stricken out and taken from the jury, and should not be considered by them as evidence in the case.

50. State what Mr. Dinkel told you, irrespective of the letters, as to whether or not the Scotch company authorized the making of the loan and receiving of the bonus.

A. He told me to give them all the bonus I could. He always told me that.

51. What, if anything, did he state to you as to their authorizing him to accept it?

A. He told me that they had authorized him to accept it.

52. State whether or not you executed notes and mortgages for the $65,000 you received at that time.

(Mr. JONES:) I object to that evidence on the ground that the giving of mortgages certainly could have nothing to do with the

particular transaction sued upon; the evidence that he made a loan and secured it is no evidence whatever that it was a usurious loan.

(The COURT:) It is only to identify the transaction; it only goes to show that this transaction was authorized by the company, that was the reason they accepted this man's notes and mortgage.

Exception reserved by defendant's counsel.

A. I did.

53. You stated when you paid over the $6,500 check, Mr. Vincent was present. What Mr. Vincent do you mean?

A. Mr. William A. Vincent, this gentleman here, (pointing towards Mr. Vincent). The attorney for the Scotch company.

54. In what capacity was he present at that time?

Objected to by Mr. Fiske, of counsel for defendant, on the ground that it has not been shown this witness knows what capacity he was in.

(Mr. SPRINGER:)

55. Do you know in what capacity Mr. Vincent was present at that time?

A. Yes, sir.

56. In what capacity was he present?

Objected to by defendant's counsel.

Objection overruled.

31 Exception reserved by defendant's counsel.

A. As attorney for the Scotch people.

57. When you say attorney for the Scotch people, who do you mean?

A. The Scottish Mortgage and Land Investment Company.

58. The defendant in this case?

A. Yes, sir.

59. Now, state whether or not you gave a note for the $65,000 you received from the defendant?

A. I did. Yes, sir.

60. For what length of time was that note to run?

A. For six years, I believe.

61. At what rate of interest?

A. At twelve per cent. per annum.

62. Did you give any mortgage of any kind to secure the payment of the note?

A. Yes, sir.

63. What mortgages did you give?

A. I gave a mortgage on the cattle, horses and on the real estate I owned.

64. Examine these copies, Mr. McBroom, of Exhibits "A," "B" and "C," filed in this case by the defendant and state whether these are copies of the mortgages executed by you to secure the $65,000 loan you have mentioned. Examine them and see if they are copies?

A. Yes, sir, these are copies of the mortgages.

65. Which you executed to secure the $65,000 loan?

A. Yes, sir.

66. State whether or not the original of the mortgages are now within your control?

A. No, sir.

(Mr. SPRINGER:) I will offer all three of these mortgages in evidence, marked Exhibits A, B and C.

(Mr. FISKE, of counsel for defendant:) We object to the introduction of these instruments on the ground that they are immaterial and incompetent; that they have nothing to do with this case; that it is immaterial whether any mortgages were given or not. The question here was the payment of money and the overpayment of interest evidenced by a note, and we object to the introduction of the mortgages as being wholly outside of the case.

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Objection overruled by the court.

Exception reserved by defendant's counsel.

(Mr. SPRINGER:) I will offer these mortgages in evidence, if the court please. The first is a mortgage on certain real estate executed by William H. McBroom to the Scottish Mortgage and Land Investment Company of New Mexico (Limited), to secure the sum of $65,000, the principal to be paid by certain principal promissory notes payable to the order of the Scottish Mortgage and Land Investment Company of New Mexico (Limited), for $65,000, six years after date, with interest at the rate of twelve per cent. per annum.

This mortgage was here introduced in evidence and is as follows:

EXHIBIT A.

This indenture, made this twentieth day of August, in the year of our Lord one thousand eight hundred and eighty-six, between William H. McBroom and Mary J. McBroom, his wife, of the county of San Miguel, in the Territory of New Mexico, parties of the first part, and George J. Dinkel, of the county of San Miguel, in the Territory of New Mexico, party of the second part, witnesseth:

That whereas, the said William H. McBroom is justly indebted unto the Scottish Mortgage and Land Investment Company of New Mexico (Limited), in the sum of sixty-five thousand dollars, gold coin of the United States of America, for money this day actually loaned, secured to be paid by a certain principal promissory note of the said William H. McBroom, bearing even date herewith, payable to the order of the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), in and by which said promissory note William H. McBroom promises to pay to the order of the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), the principal sum of sixty-five thousand dollars, as aforesaid, six years after date thereof, with interest thereon at the rate of twelve per centum per annum, payable as hereinafter

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provided, until the said principal sum shall have been fully paid; said interest for the said period of six years being also secured by seven several interest notes, of even date herewith, both principal and interest payable at the office of the Scottish Mortgage and Land Investment Company of New Mexico (Limited), in the town of Las Vegas, in the Territory of New Mexico, one of said interest notes being for the sum of twenty-eight hundred forty-two and $\frac{10}{100}$ dollars, due Dec. 31st, 1886; five of said notes being each for seven thousand eight hundred dollars, due Dec. 31st of years 1887, 1888, 1889, 1890, 1891 and one note for forty-nine hundred sixty-five $\frac{50}{100}$ dollars, due August 20th, 1892.

Now therefore, this indenture witnesseth, that the said parties of the first part, for the better securing of the payment of the said sum of money and the interest thereon mentioned in said principal promissory note, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar in hand paid to the said parties of the first part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, and his successor in trust or assigns forever, all those certain lots, pieces and parcels of land, situate, lying and being in the county of San Miguel and the Territory of New Mexico, known and described as follows, to wit:

34 Notice is hereby given that whereas William H. McBroom and Mary J. McBroom, his wife, of the county of San Miguel and Territory of New Mexico, did by their certain deed of trust of date the twentieth day of August, A. D. 1886, recorded in the office of the probate clerk and *ex officio* recorder of the county of San Miguel, and Territory of New Mexico, in Book Five of Mortgage Records of said San Miguel county, pages 345 to 358, on the 25th day of September, A. D. 1886, convey to the undersigned trustee certain lots, tracts, pieces and parcels of land and real estate, situate, lying and being in the county of San Miguel and Territory of New Mexico, and described in said deed of trust, as follows, to wit:

The southwest quarter of the southwest quarter of section four (4), and also the west half of the northwest quarter, and the northwest quarter of the southwest quarter of section nine (9), township seven (7) north, range twenty-eight (28), east, containing 160 acres.

The southeast quarter of section eight (8), township seven (7) north, range twenty-eight (28) east, containing 160 acres.

The east half of the southeast quarter and the northwest quarter of the southeast quarter of section ten (10), and also the southwest quarter of the southwest quarter of section eleven (11), township seven (7) north, range twenty-eight (28) east, containing 160 acres.

The northeast quarter of section eight (8), township seven (7) north, range twenty-eight (28) east, containing 160 acres.

The east half of the northwest quarter of section twenty (20), township six (6) north, range twenty-seven (27) east, containing eighty (80) acres.

The east half of the southeast quarter of section twenty-eight (28), township five (5) north, range twenty-four (24) east, containing eighty (80) acres.

35 The west half of the northeast quarter and the northeast quarter of the southeast quarter of section thirty-four (34), township five (5) north, range twenty-four east, containing 120 acres.

The north half of the southeast quarter of section four (4), township five (5) north, range twenty-nine (29) east, containing 80 acres.

The west half of the southeast quarter of section thirty-three (33), township four (4) north, range twenty-five (25) east, and also the southwest quarter of the southeast quarter of section twenty-seven (27), township four (4) north, range twenty-four (24) east, containing 120 acres.

The southeast quarter of the southeast quarter of section twenty-eight (28), and also the southwest quarter of the northeast quarter and the northeast quarter of the northeast quarter of section ten (10), township four (4) north, range twenty-four (24) east, containing 120 acres.

The east half of the southwest quarter and the southeast quarter of the northwest quarter and the northwest quarter of the southeast quarter of section fifteen (15), township four (4) north, range twenty-four (24) east, containing 160 acres.

The north half of the southwest quarter and the east half of the northwest quarter of section twenty-two (22), township four (4) north, range twenty-four east, containing 160 acres.

The south half of the northwest quarter and the northwest quarter of the northwest quarter of section twenty-seven (27), and also the northeast quarter of the northeast quarter of section twenty-eight (28), township four (4) north, range twenty-four (24) east, containing 160 acres.

The south half of the northeast quarter and the northwest quarter of the northeast quarter and the northeast quarter of the northwest quarter of section twenty-seven (27), township four (4) north, range twenty-four (24) east, containing 160 acres.

36 The southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of section two (2), and also the north half of the northwest quarter of section eleven (11), township four (4) north, range twenty-four (24) east, containing 160 acres.

The northwest quarter of the southeast quarter and the east half of the southeast quarter, and lot one (1) (it being identical with the southeast quarter of the northeast quarter) of section two (2), township four (4) north, range twenty-four (24) east, containing 160 acres.

The north half of the northeast quarter and the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section twenty-six (26), township four (4) north, range twenty-four (24) east, containing 160 acres.

The north half of the southwest quarter and the southwest quarter of the northwest quarter of section thirty (30), township four

(4) north, range twenty-five (25) east; and also the northeast quarter of the southeast quarter of section twenty-five (25), township four (4) north, range twenty-four (24) east, containing 160 acres.

The northeast quarter of the southeast quarter and the south half of the northeast quarter and the southeast quarter of the northwest quarter of section thirty (30), township four (4) north, range twenty-five east, containing 160 acres.

The southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter and the northwest quarter of the southeast quarter of section twenty (20), township four (4) north, range twenty-five (25) east, containing 120 acres.

The east half of the northeast quarter and the southwest quarter of the northeast quarter and southeast quarter of the northwest quarter of section twenty-nine (29), township four (4) north, range twenty-five (25) east, containing 160 acres.

37 The southwest quarter of the southwest quarter of section twenty-five [25], township four [4] north, range twenty-five [25] east, containing 40 acres.

The northwest quarter of the southwest quarter of section twenty-nine [29], township four [4] north, range twenty-five [25] east, containing 40 acres.

The north half of the southeast quarter and the southeast quarter of the southeast quarter of section twenty-nine [29], township four [4] north, range twenty-five [25] east, containing 120 acres.

The southeast quarter of the southeast quarter of section thirty-three [33], and also the southwest quarter of the southwest quarter of section thirty-four [34], township four [4] north, range twenty-five [25] east; and also the north half of the northwest quarter of section three [3], township three [3] north, range twenty-five [25] east, containing 160 acres.

The northeast quarter of the northeast quarter of section thirteen [13], township four [4] north, range twenty-eight [28] east, containing 40 acres.

The southeast quarter of the southeast quarter of section thirty-three [33], and also the northwest quarter of the southwest quarter of section thirty-four, township four [4] north, range twenty-eight [28] east, containing 80 acres.

The southwest quarter of the northwest quarter and the north half of the southwest quarter and the northwest quarter of the southeast quarter of section twenty-six [26], township four [4] north, range twenty-eight [28] east, containing 160 acres.

The southeast quarter of the southeast quarter of section twenty-three [23], and also the northeast quarter of the northeast quarter of section twenty-six [26], township four [4] north, range twenty-eight east, and also the southwest quarter of the southeast quarter of section seven [7], township four [4] north, range twenty-nine east, containing 120 acres.

38 The southeast quarter of the southeast quarter of section five [5], township four (4) north, range twenty-nine (29) east, containing 40 acres.

The northeast quarter of the northeast quarter of section eight

[8], township four [4] north, range twenty-nine [29] east, containing 40 acres.

The southwest quarter of the northwest quarter of section ten [10], township four [4] north, range twenty-nine [29] east, containing 40 acres.

The southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of section thirty-three [33], township four [4] north, range twenty-nine [29] east, and also the east half of the northwest quarter of section four [4]; township three [3] north, range twenty-nine [29] east, containing 160 acres.

The west half of the northeast quarter and the southeast quarter of the northwest quarter of section three [3], township three [3] north, range twenty-five east, containing 120 acres.

The southeast quarter of the northeast quarter of section three [3], and also the south half of the northwest quarter and the southwest quarter of the northeast quarter of section two [2], township three [3] north, range twenty-five [25] east, containing 160 acres.

The southeast quarter of the northeast quarter and the east half of the southeast quarter of section two [2], and also all the southwest quarter of the southwest quarter of section one [1], township three [3] north, range twenty-five [25] east, containing 160 acres.

The southeast quarter of the southwest quarter of section twelve [12], and also the east half of the northwest quarter and the southwest quarter of the northeast quarter of section thirteen [13], township three [3] north, range twenty-five [25] east, containing 160 acres.

The south half of the southeast quarter and the northwest quarter of the southeast quarter and the northeast quarter of the
39 southwest quarter of section thirteen (13), township three (3) north, range twenty-five east, containing 160 acres.

The north half of the southwest quarter and the west half of the northwest quarter of section twelve (12), township three (3) north, range twenty-five east, containing 160 acres.

The east half of the northwest quarter and the southwest quarter of the northeast quarter and the northwest quarter of the southeast quarter of section twelve (12), township three (3) north, range twenty-five (25) east, containing 160 acres.

The east half of the northeast quarter of section twenty-four (24), township three (3) north, range twenty-five (25) east, and also the west half of the northwest quarter of section nineteen (19), township three (3) north, range twenty-six (26) east, containing 160 acres.

The north half of the northwest quarter of section seventeen (17), township three (3) north, range twenty-six (26) east, containing 80 acres.

The west half of the southeast quarter and the east half of the southwest quarter of section eight (8), township three (3) north, range twenty-six (26) east, containing 160 acres.

The southeast quarter of the southeast quarter of section twenty-four (24), township three (3) north, range twenty-seven (27) east, and also the southwest quarter of the northeast quarter of section four (4), and the southeast quarter of the northeast quarter of sec-

tion nine (9), township three (3) north, range twenty-eight (28) east, containing 120 acres.

The northeast quarter of the northeast quarter of section four (4), and also the southwest quarter of the northwest quarter of section three (3), township three (3) north, range twenty-eight (28) east, containing 80 acres.

40 The south half of the southeast quarter of section eight (8), township three (3) north, range twenty-eight (28) east, containing 80 acres.

The north half of the northeast quarter and the southeast quarter of the northeast quarter of section seventeen (17), township three (3) north, range twenty-eight (28) east, containing 120 acres.

The southeast quarter of the southeast quarter of section seven (7), and also the north half of the northwest quarter of section seventeen (17), township three (3) north, range twenty-eight (28) east, containing 120 acres.

The west half of the southwest quarter of section eight (8), township three (3) north, range twenty-eight east, containing 80 acres.

The northeast quarter of the southwest quarter and the south half of the southwest quarter of section thirty-one (31), township three (3) north, range twenty-nine (29) east, and also the northeast quarter of the northwest quarter of section six (6), township two (2) north, range twenty-nine (29) east, containing 160 acres.

The north half of the northeast quarter of section one (1), township two (2) north, range twenty-eight (28) east, containing 80 acres.

The southwest quarter of section twenty (20), township five (5) north, range twenty-seven (27) east, containing 160 acres.

The northeast quarter of section twenty-six (26), township seven (7) north, range twenty-eight (28) east, containing 160 acres.

The southeast quarter of the northwest quarter, the east half of the southwest quarter and the southwest quarter of the southeast quarter of section five (5), township seven (7) north, range twenty-seven (27) east, containing 160 acres.

The south half of the southeast quarter and the northwest quarter of the southeast quarter and the southeast quarter of the

41 southwest quarter of section five (5), township seven (7) north, range twenty-eight (28) east, containing 160 acres.

The south half of the southeast quarter of section twenty-six (26), and the northeast quarter of the northeast quarter of section thirty-five (35), township four north, range twenty-eight (28) east, containing 120 acres.

Said above-described tracts of land containing in all seven thousand and fifty [7,050] acres of water land, four thousand of which are patented, and for the balance of which, said William H. McBroom holds final receipts from the United States. About two thousand [2,000] acres of said land can be irrigated, and including an orchard of four hundred [400] trees at the "home ranch," and also the telegraph poles, wires and fixtures on the ranch of the said

William H. McBroom, together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all the reversions, remainder and remainders, rents, issues and profits thereof, and also all the right, title, interest, property, possession, dower, claim and demand whatsoever of the said William H. McBroom and Mary J. McBroom, his wife, which said conveyance was made in trust to secure the payment of a certain principal promissory note for the sum of sixty-five thousand (865,000) dollars, together with certain interest notes in the said deed particularly mentioned and described, executed by the said William H. McBroom to the order of the Scottish Mortgage and Land Investment Company of New Mexico (Limited), payable six years after date, and in said deed of trust fully mentioned, described and provided for. And whereas, default has been made in the payment of some of said interest notes, by means of which said entire sum has become due, as provided by said deed of trust; now, therefore, at the written request of the Scottish Mortgage and Land Investment Company of New Mexico (Limited), the legal holder
42 of said principal note and of said interest notes, and under and by virtue of the terms, provisions and conditions of said deed of trust, and the power in me thereby vested, George J. Dinkel, trustee, being absent from the Territory of New Mexico, I, the undersigned, as trustee, successor in trust, will, for the purpose of paying said principal note and interest, the sums of money advanced or paid out under the provisions of said deed of trust and all other costs as therein provided for and incurred by virtue thereof, on Saturday, the twenty-sixth day or July, A. D. 1890, at ten o'clock a. m., at the front door of the post office, in the city of Las Vegas, county of San Miguel and Territory of New Mexico, proceed to sell and sell at public auction to the highest bidder, for cash, all and singular the above-described property, lots, tracts and parcels of land and real estate, and all the right, title, benefit, dower and equity of redemption of the said William H. McBroom, Mary J. McBroom, his wife, their heirs and assigns therein.

CHARLES BLANCHARD,
Trustee, Successor in Trust.

Las Vegas, New Mexico, June 17th, 1890.

JOHNSON, VINCENT & JONES,
Solicitors.

[Matter enclosed between rules erased with pencil in copy.]

Said above-described tracts of land containing in all seven thousand and fifty (7,050) acres of water lands, four thousand (4,000) of which are patented, and for the balance of which, said Wm. H. McBroom holds final receipts from the United States; about two thousand (2,000) acres of said land can be irrigated, and including an orchard of four hundred [400] trees at the "home ranch," and also the telegraph poles, wires and fixtures on the ranch of the said William H. McBroom, (the words "one of said interest notes being

for the sum of twenty-eight hundred forty-two and $\frac{1}{100}$ dollars due Dec'r 31st, 1886, five of said notes being each for seven thousand eight hundred dollars, due Dec'r 31st, of the years, 1887, 1888, 1889, 1890, 1891, and one note for forty-nine hundred sixty-
43 five $\frac{55}{100}$ dollars, due August 20th, 1892," on the middle of first page, inserted before signing, sealing or delivery of this instrument). After two years McBroom to have privilege, by giving three months' notice, on paying one thousand dollars bonus, to take up this loan, or part of loan by paying proportionate part of one thousand dollars.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and all reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in and to the same and every part and parcel thereof, with the appurtenances; in trust, nevertheless: That in case of default in the payment of said principal promissory note, or any part thereof, or the interest thereon, according to the tenor and effect of said principal note, and according to the tenor and effect of said interest notes, or any or either of them, or in case of the breach of any of the covenants and agreements of said principal promissory note, or of said interest promissory notes therein mentioned, then on the application in writing of the legal holder of said notes, to enter into possession of the above-described property, to eject them, the said grantors, their tenants, to let the same to a tenant or tenants at such rates as may be obtainable, or to sell and dispose of said premises entire, without division, or in parcels, as said party of the second part may think best, and all the right, title, benefit and equity of redemption of the said parties of the first part, their heirs and assigns therein, at public auction at the front door of the post office, in the city of Las Vegas, in the county of San Miguel and Territory of New Mexico, or on said premises, or on any part thereof, as may be specified in the notice of said sale, for the highest
44 and best price the same will bring in cash, four weeks' notice having been previously given of the time and place of sale by advertisement in any newspaper published in San Miguel county, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds and avails of such sale, and the purchase-money paid thereon, after first paying all costs of advertising, sale and conveyance, including the reasonable fees of the said party of the second part and a reasonable solicitor's fee, and all other expenses of this trust, including all moneys advanced for insurance, taxes and other liens or assessments, including interest thereon at one per cent., per month, then to pay the principal and interest of said principal promissory note, whether due and payable by the tenor thereof or not, and the interest due on said interest note or notes, up to the time of such sale, rendering the overplus, if any, unto the said parties of the first part, their

legal representatives or assigns, on reasonable request; provided, if there should not be sufficient to pay both principal sum and interest, all interest due shall be first paid and the remaining sum endorsed on the principal note as so much paid, (and it shall not be obligatory upon the purchaser or purchasers at any such sale to see the application of the purchase-money), which sale or sales so made shall operate to divest all the title of the said parties of the first part to the property so sold, both at law and equity, and shall be a perpetual bar both at law and equity, against said parties of the first part, their heirs and assigns, and all other persons claiming the premises aforesaid, or any part thereof, by, from or through said parties of the first part, or any of them.

And in the case of any suit or proceedings at law or in equity, wherein said party of the second part shall be made a party by reason of his trusteeship, he shall be allowed and paid his reasonable costs, charges, attorney's and solicitor's fees in said suit
45 or proceedings, and the same shall be a further charge and lien on said premises under this deed, to be paid out of the proceeds of the sale thereof as aforesaid, with interest thereon at the rate of one per cent. per month, if not otherwise paid by said parties of the first part; and the said party of the second part, or his successor in trust, with or without readvertisement, is hereby authorized to postpone or adjourn said sale from time to time at his discretion, and also to sell and dispose of said premises in mass or in separate parcels; and the said William H. McBroom and Mary J. McBroom, his wife, for themselves, their heirs, executors or administrators, covenant and agree to and with the said party of the second part and his successor in trust, hereinafter named, that at the time of the ensealing and delivery of these presents they are well seized of said premises in fee simple, and have good right, full power and lawful authority to grant and sell the same in manner and form as aforesaid, and that the same are free from all incumbrances or liens whatever.

And the said parties of the first part will in due season pay all taxes and assessments on said premises, and all taxes that may be assessed or levied on the indebtedness secured by this deed, against the owner or holder thereof, and at the request of the holder of said principal promissory note, will keep all buildings, improvements, machinery or structures, that may at any time be on said premises during the continuance of said indebtedness, in good repair and insured in such company or companies as the holder of said note may from time to time direct, and for such sum or sums as such company or companies will insure for, and will assign with the proper assent of the insurer, the said policy or policies of insurance to the said holder of said note, as further security for the indebtedness aforesaid; and in case of the refusal or neglect of the said parties of the first part, or either or any of them, to insure or assign the policy or policies of insurance, or to pay such taxes or
46 assessments, said party of the second part, his successor in trust, or the holder of said note, may procure such insurance or pay such taxes or assessments, and all moneys thus paid, with

interest thereon at one per cent. per month, shall become so much additional indebtedness to be secured by this deed of trust, and to be paid out of the proceeds of the sale of the lands and premises aforesaid, if not otherwise paid by the said parties of the first part; and the quiet and peaceable possession of the said party of the second part or his successor in trust, against all and every other person lawfully claiming or to claim the whole or any part thereof, the said parties of the first part shall and will warrant and defend; and it is stipulated and agreed that in case of default in any of the said payments of the principal note, or of the interest notes, or either of them according to the tenor and effect of said principal promissory note, or the interest notes aforesaid, or any part thereof, or of the breach of any of the covenants or agreements herein, by the said parties of the first part, their executors, administrators or assigns, then, in that case, the whole of said principal sum hereby secured, and the interest thereon to the time of sale, may at once, at the option of the legal holder thereof, be declared due and payable, and the premises be sold in the manner and with the same effect as if the said indebtedness had matured according to the tenor and effect of the said principal promissory note.

And it is further agreed, and especially understood, that in case of the death, resignation, removal or absence from the county of San Miguel, or refusal, or failure, or inability of said party of the second part to act, then Charles Blanchard, of the county of San Miguel, and Territory of New Mexico, shall be and hereby is appointed and made successor in trust of the said party of the second part, and in such event the said lands and premises shall become vested in such new trustee, and all the power and authority by this indenture granted to said party of the second part shall
47 accrue to and be exercised by the said Charles Blanchard, the same to all intents and purposes as if he had been made the party of the second part herein.

And it is further agreed, that the legal holder of said principal note above mentioned and described shall have full power and authority at any time and for any reason (of the sufficiency of which he shall be sole judge), to remove the said second party and his successor in trust hereunder, or either of them, from the office of trustee and appoint a substitute or substitutes, in writing, who shall have and exercise, all the rights and powers herein conferred upon the said party of the second part, or his successor in trust, and the said parties of the first part do by these presents, fully and absolutely ratify and confirm any and all acts which the said party of the second part, or his successor in trust, or their substitute or substitutes as herein provided, may do in the premises by virtue thereof.

And it is hereby further expressly consented and agreed, that if the above-described property be sold under the provisions of this deed, the said trustee, or the said corporation, shall have the right to purchase said property at such sale.

In witness whereof, the aforesaid parties of the first part have

hereunto set their hands and seals the day and year first above written.

(S'g'd) WILLIAM H. McBROOM. [SEAL.]
(S'g'd) MARY J. McBROOM. [SEAL.]

TERRITORY OF NEW MEXICO, }
County of San Miguel. }

Before me, a notary public in and for said county, in the Territory aforesaid, on the twentieth day of August, A. D. 1886, personally appeared William H. McBroom and Mary J. McBroom, his wife, to me well and personally known to be the same persons whose names are subscribed to the annexed trust deed and as parties thereto, and as having executed the same, and acknowledged that they had signed, sealed and executed the said trust deed, and released all their right, title and interest therein, either by virtue of any homestead or exemption laws of the Territory of New Mexico, or otherwise, freely and voluntarily for the uses and purposes therein mentioned. And said Mary J. McBroom, having been by me examined separately and apart from, independent of, and out of hearing of her said husband, and the contents and meaning of said trust deed having been by me made known and fully explained to her, acknowledged that she had signed, sealed and executed the same, and relinquished any right of dower or other right she may have, and any and all right under and by virtue of the homestead or exemption laws of New Mexico, freely and voluntarily and without the compulsion or illicit influence of her husband.

48

Witness my hand and notarial seal at Las Vegas, New Mexico, this twentieth day of August, A. D. 1886.

[SEAL.] (S'g'd) JOHN D. W. VEEDER,
Notary Public.

Endorsed: Deed of trust. William H. McBroom to George J. Dinkel.

TERRITORY OF NEW MEXICO }
County of San Miguel, } ss:

I hereby certify that this deed was filed for record at 4.30 o'clock p. m., 25th of September, 1886, and is duly recorded in Book 5, pages 345 to 358 of mortgage deed record.

—— ——, *Recorder.*

(Mr SPRINGER:) Exhibit B, is a chattel mortgage upon certain horses, stallions and cattle, wagons and buggies, to secure the sum of $65,000, between the same parties, and the third mortgage (marked Exhibit C), is a chattel mortgage upon certain cattle and horses between the same parties to secure a portion of the same debt. I will offer them in evidence.

49

Exhibit B.

Know all men by these presents: That on this 20th day of August, A. D. 1886, William H. McBroom, of the county of San Miguel and Territory of New Mexico, party of the first part, for and in consideration of the sum of sixty-five thousand (865,000) dollars, to him in hand paid by The Scottish Mortgage and Land Investment Company of New Mexico (Limited), of the county of San Miguel and Territory of New Mexico, party of the second part, the receipt of which is hereby acknowledged, does hereby grant, bargain and sell unto the said party of the second part, its successors and assigns, the following goods, chattels and live stock, to wit: Four thousand (4,000) head of cattle branded "H" on each hip, with underbit from each ear. It being intended to hereby mortgage all of said herd of cattle excepting the steers of said herd which said first party shall have the right to keep or to sell, and there being in said herd about three thousand head of she cattle. Eighty-five (85) head good, saddle horses, branded "H" on each hip. Three hundred (300) head brood mares and young horses branded "H" on each hip. One (1) thoroughbred stallion (not branded). One Denmark saddle stallion (not branded). One (1) all-purpose stallion, (not branded), sixty-eight (68) thoroughbred bulls branded "H" on each hip. The female increase of said first-mentioned herd of cattle to be included in and covered by this mortgage; and all the foregoing live stock now being and to be contained on the range of the first party in the county of San Miguel and Territory of New Mexico. Also one buggy, one buckboard, four (4) wagons, one light spring wagon, three plows, blacksmith and carpenters' outfit, and harness now owned by first party.

50 To have to hold all and singular the said goods, chattels and live stock unto the said party of the second part, its successors and assigns forever. And the said party of the first part, for himself, his heirs, executors and administrators, does hereby covenant to and with said party of the second part, and its successors and assigns that he is lawfully possessed of the said goods, chattels and live stock, as of his own property, that the same are free from all incumbrances, and that he will warrant and defend the same to the said party of the second part and its successors and assigns against the lawful claims and demands of all persons. Provided, nevertheless, that if the said party of the first part or his heirs, executors and administrators shall well and truly pay to the said party of the second part and its successors or assigns the just and full sum of sixty-five thousand (865,000) dollars, according to the tenor and effect of a certain promissory note of even date herewith for said sum, payable to the order of said second party, at its office, in Las Vegas, New Mexico, six years after the date thereof, and signed by said first party. Also seven (7) interest notes of even date herewith, all payable to second party or its order, and all signed by said first party. One of said notes being for the sum of two thousand eight hundred and forty-two $\frac{19}{100}$ (82,842.19) dollars,

and due December 31st, 1886. Five (5) of said notes being each for the sum of seven thousand eight hundred (87,800) dollars, and payable respectively December 31st of the years 1887, 1888, 1889, 1890 and 1891. One of said notes being for the sum of four thousand nine hundred and sixty-five $^{57}/_{100}$ ($4,965.57) dollars, and payable August 20th, A. D. 1892, then these presents to be void, otherwise to remain in full force and virtue. And provided further, that until default be made by the said party of the first part in the performance of the condition aforesaid, it shall, and may be lawful for him to retain possession of the said goods, chattels and live stock, and to use and enjoy the same, but in
51 case default should be made in the payment of said principal promissory note or of any of said interest notes, according to their tenor and effect, or if the goods, chattels and live stock or any part thereof shall be attached or claimed by any other person or persons at any time before payment, or if the said party of the first part shall attempt to sell or remove the same without the authority or permission of the said party of the second part, in writing expressed, then it shall and may be lawful for the said party of the second part, its general manager, agent or attorney, to take immediate and full possession of the whole of said goods, chattels and live stock to its own use and sell the same in manner and form as now prescribed by law, and out of the money arising from such sale to pay said principal promissory note and said interest notes, and all charges touching the same, including a reasonable solicitor's fee, rendering and paying the surplus, if any, in accordance with the form of the statute in such cases made and provided.

In witness whereof the said party of the first part has hereunto set his hand and seal this 20th day of August, A. D. 1886.

WILLIAM H. McBROOM. [L. S.]

Signed, sealed and delivered in presence of—
J. S. RAYNOLDS.
J. S. PISHON.

TERRITORY OF NEW MEXICO, }
County of San Miguel, } *ss:*

On this 20th day of August, A. D. 1886, personally came before me William H. McBroom, to me well and personally known to be the person whose name is signed to the foregoing instrument, and acknowledged that he signed, sealed and executed the said chattel mortgage for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written.

[SEAL.] ALFRED B. SMITH,
Notary Public.

52 EXHIBIT C.

Know all men by these presents: That William H. McBroom, of the county of San Miguel and Territory of New Mexico, party of

the first part, for and in consideration of the sum of forty-three thousand nine hundred and sixty-five $\frac{57}{100}$ dollars to him in hand paid by the Scottish Mortgage Land and Investment Company of New Mexico (Limited), party of the second part, the receipt of which is hereby acknowledged, does hereby grant, bargain and sell unto the said party of the second part, its successors and assigns, the following goods and chattels, viz: About four thousand (4,000) head of cattle branded "H" on each hip, with underbit from each ear. It being hereby intended to mortgage all of said herd except the steers; eighty-five (85) head of good saddle horses branded "H" on each hip; three hundred (300) head of brood mares and young horses branded "H" on each hip; one thoroughbred stallion (not branded); one Denmark stallion (not branded), one all-purpose stallion (not branded), sixty-eight (68) thoroughbred bulls branded "H" on each hip. The female increase of said first-mentioned herd of cattle both included in and to be covered by this mortgage. And all of said stock now on the range of party of the first part in San Miguel county, in said Territory. Also fifteen hundred (1,500) head of steers branded "H" on each hip, which said steers are ranging with other mentioned stock, meaning and intending to mortgage all the steers in said brand.

To have and to hold: All and singular the said goods and chattels unto the said party of the second part, its successors and assigns forever. And the said party of the first part, for himself, his heirs, executors and administrators, does hereby covenant to and with said party of the second part, and its assigns that he is lawfully possessed of the same goods and chattels as of his own property, free, and that he will warrant and defend the
53 same to the said party of the second part and his assigns against the lawful claims and demands of all persons: Provided, nevertheless, that if the said party of the first part his heirs, executors and administrators shall well and truly pay to the said party of the second part, its successors and assigns for the redemption of the above-bargained goods and chattels, the just and full sum of forty-three thousand nine hundred and sixty-five $\frac{57}{100}$ dollars, according to the terms of six promissory notes, all executed by first party to order of second party and all bearing interest at the rate of two per cent. a month after maturity, and all dated Las Vegas, New Mexico, August 20th, 1886. Five of said notes being each for the sum of seven thousand eight hundred dollars and payable respectively December 31st, 1887, December 31st, 1888, December 31st, 1889, December 31st, 1890, December 31st, 1891; sixth note for the sum of four thousand nine hundred and sixty-five $\frac{57}{100}$ dollars, and due August 20th, 1892; then these presents to be void, otherwise to remain in full force and virtue. And provided further, that until default be made by the said party of the first part in the performance of the condition aforesaid, it shall, and may be lawful for him to retain possession of the said goods and chattels and to use and enjoy the same, but in case default should be made in the payment of said notes or any of them, or the interest therein mentioned according to their tenor, or if said

goods and chattels or any part thereof shall be attached or claimed by any other person or persons at any time before payment, or if the said party of the first part shall attempt to sell or remove the same without the authority or permission of the said party of the second part, in writing expressed, then it shall and may be lawful for the said party of the second part, its general manager, agent or attorney, to take immediate and full possession of the whole of said goods and chattels, to its own use and sell the same in manner and form as now prescribed by law, and out of the money arising from such sale to pay said notes and interest and all charges touching the same, rendering and paying surplus, if any, in accordance with the form of the statute in such cases made and provided.

In witness whereof the said party of the first part hath hereunto set his hand and seal this third day of March, A. D. 1887.

WILLIAM H. McBROOM. [L. S.]

Signed, sealed and delivered in presence of—

——— ———.

TERRITORY OF NEW MEXICO, }
County of San Miguel, } *ss:*

Be it remembered, that on this third day of March, A. D. one thousand eight hundred and eighty-seven, before me, the undersigned, a notary public in and for said county in the Territory aforesaid, personally came William H. McBroom, to me well and personally known to be the same person whose name is subscribed to the foregoing chattel mortgage as party thereto and acknowledged that he signed, sealed and executed the said instrument of writing for the uses, purposes and consideration therein set forth.

Witness my hand and official seal the day and year last above written.

[SEAL.] JESUS M. TAFOYA,
Probate Clerk.

67. State whether you paid any of those interest notes upon the $65,000 loan?

A. Yes, sir, I did.

68. When did you pay them?

A. On the 21st day of December, 1886, I paid the first interest.

69. Examine this check and receipt, and say whether that is the evidence of that payment?

A. Yes, sir.

55 (MR. SPRINGER:) I offer in evidence, if the court please, a receipt, or rather an interest coupon it seems to be for $2,842.19; also the check which Mr. McBroom says he paid it with, and ask*ed* that the same be marked respectively Exhibit- "D" and "E."

EXHIBIT D.

Interest Note No. 1.

$2,842.19. LAS VEGAS, N. M., *20th August*, 1886.

Due to the order of the Scottish Mortgage and Land Investment Company of New Mexico (Limited), twenty-eight hundred forty-two $\frac{19}{100}$ dollars, in gold coin of the United States, on the thirty-first day of December, 1886, without grace, at its office in Las Vegas, with penalty, after maturity, at the rate of two per cent. per month, being for an installment of interest due that day upon one promissory note, of even date herewith, for the sum of sixty-five thousand dollars, payable to the order of the Scottish Mortgage and Land Investment Company of New Mexico (Limited), six years after its date, and secured by deed of trust to Geo. J. Dinkel, bearing even date herewith.

WILLIAM H. McBROOM.

(Endorsed:) Pay First National Bank of Las Vegas, N. M., or order for collection and credit of the Scottish Mortgage and Land Investment Company of New Mexico (Limited), Geo. J. Dinkel, manager.

(Stamped:) "First National Bank, Las Vegas, N. M. Paid Dec. 31, 1886."

EXHIBIT E.

LAS VEGAS, N. M., 12, *31st*, 1886.

First National bank

56 Pay to Scottish M'tg'e Co., interest note attached, or bearer, twenty-eight hundred forty-two and $\frac{19}{100}$ dollars, $2,842.19, account—

W. H. McBROOM.
R.

(Stamped:) First National Bank, Las Vegas, N. M. Paid Dec. 31, 1886.

70. State whether or not the $6,500 paid by you as you have testified as a bonus for that loan has ever been repaid to you, by the defendant, or credited to your credit in any way.

Objected to by defendant's counsel on the ground that plaintiff has no knowledge of that fact, and it is not shown that he has any.

Objection overruled by the court.

Exception reserved by defendant's counsel.

A. No, sir.

71. Examine this paper and state if you know what it is, and where you received it. Did you ever see it before?

A. Yes, sir.

72. Did you ever have it in your possession?
A. Yes, sir.
73. Where did you get it?
A. I received it through the mail from Mr. Dinkel, the Scotch manager.
74. Do you know whose handwriting that signature is?
A. Yes, sir.
75. Whose is it?
A. Mr. Dinkel's.
76. What Mr. Dinkel do you mean?
A. George J. Dinkle, manager for the Scotch Company.

Mr. SPRINGER:) I offer this paper in evidence. It is a letter from the manager of the Scotch Company to Mr. McBroom.

57 (Mr. FISKE:) We object to the introduction of this letter for the reason that it don't appear to have anything to do with this case. This letter relates to a transaction of this sort. After the money was borrowed McBroom thought he might desire to repay it, and he made application to the company and the company declined a repayment at that time under certain circumstances that are not referred to in this letter. I don't see what it has to do with this case.

(Mr. SPRINGER:) This letter shows the capacity of Mr. Dinkel as manager, written on the official letter-head of the Scottish Mortgage and Land Investment Company, with Mr. Dinkel's name at the head of it, written to Mr. McBroom in reference to the matter of his loan from that company, and I introduce it principally for the purpose of showing the capacity in which Mr. Dinkel was held out to the public in connection with that company, and I ask your honor to examine it.

(The COURT:) For the purpose of showing that Mr. Dinkel held himself out to the public as manager of the company, the letter is admissible.

(Mr. FISKE:) I object on the ground that it is incompetent for the purpose of showing, or intending to show that George J. Dinkel was manager or agent of the Scottish Mortgage and Land Investment Company in 1886, at the date when the transaction complained of in the declaration occurred, and because it is incompetent and immaterial for any purpose in this case.

Objection overruled by the court.
Exception reserved by defendant's counsel.
(The letter was here marked Exhibit "F.")

77. Examine this paper and state if you know what it is? If you have ever seen it before, and where it came from?
A. It is signed by George J. Dinkel, manager, and the handwriting is the handwriting of Mr. Loudon.
78. The signature is in whose handwriting?
58 A. George J. Dinkel's, Scotch manager.
79. Where did you get this paper?
A. Received it through the mail.

(Mr. SPRINGER:) I offer the paper in evidence.

Counsel for the defendant object to the introduction of the paper on the same grounds as in objections stated to the introduction of Exhibit F.

Objections overruled.

Exceptions reserved by defendant's counsel.

(The paper was marked Exhibit G.)

(Mr. SPRINGER:) The first of these letters admitted by the court (Exhibit F), is headed "The Scottish Mortgage and Land Investment Company of New Mexico (Limited), George J. Dinkel, general manager. Hugh Loudon, assistant manager," dated July 21, 1887, Las Vegas, New Mexico, addressed to W. H. McBroom, Esq., and signed George J. Dinkel, manager. The next one, Exhibit G, is written on the same letter-head, George J. Dinkel, general manager, and dated May 3d, 1888. I propose to offer these letters in evidence for the purpose of proving the continued actions of Mr. Dinkel as manager with reference to this loan to McBroom, showing the continuance of the official connection of Dinkel with this company.

(Mr. FISKE:) I object to the introduction of the letters in evidence, and move that the same be taken from the jury on the ground that subsequent acts of Mr. Dinkel are not admissible.

(The COURT:) It strikes me that subsequent acts are not admissible.

(Mr. SPRINGER:) I introduce these letters to show the notoriety in which he was held out to the public.

(The COURT:) I think it would be better to observe the rule strictly, the objection will be sustained.

(The COURT to jury): The two letters, gentlemen of the
59 jury, are withdrawn from your consideration, and you are instructed not to take any cognizance of them as evidence in this case.

Cross-examination by A. A. JONES, Esq.:

1. You say that in the year 1886, you borrowed $65,000 from this defendant, do you?

A. I said that I borrowed $65,000 from the Scotch Mortgage and Land Investment Company.

2. What amount of that has been repaid, or was repaid at the time your suit was brought?

Objected to by Mr. Springer as immaterial and not proper cross-examination.

Objection overruled by the court.

Exception reserved by plaintiff's counsel.

A. Principal or interest do you mean?

3. I mean both. How much had you paid back to the company on account of the general loan at the time of bringing this suit, September 24th, 1889?

A. I had paid the first interest note.

4. Of how much?

A. A little more than twenty-eight hundred dollars. Between twenty-eight hundred and twenty-nine hundred dollars.

5. What other amounts, if any, had you paid back to the company, in either principal or interest, prior to the commencement of the suit?

A. I don't remember that I paid any other sums.

6. Then you want the jury to understand that at the time this suit was brought, you had in 1886 borrowed $65,000 from this defendant and had only repaid to the defendant on account of either interest or principal the sum of $2,842.19?

A. That was the sum that I paid.

7. Then at that time the only interest which you had paid was this $2,842.19?

A. Yes, sir.

60 8. And no payment had been made on the principal?

A. I believe not.

9. Going back to the time that this loan was made or a short time prior thereto, you stated that you first agreed to give to the Scotch company a one-eighth interest in your ranch and property as a bonus for obtaining this loan, and that you agreed also at that time to give Dinkel a one-eighth interest in the same property. What did you offer to give to Dinkel that one-eighth interest for?

A. The second one-eighth interest was not agreed to be given at the first time, it was given a short time afterwards.

10. Well, you promised at one time to give to Dinkel personally, a one-eighth interest in that property, didn't you?

A. When they first agreed to give me the loan the Scottish people were to get a one-eighth interest.

11. But at one time you agreed to give Dinkel personally, one-eighth interest in your property, didn't you?

A. Some time after the one-eighth was agreed to be given to the Scottish Company, I did.

12. Answer my question directly. Did you or did you not, at any time, prior to the making of this loan with the Scotch people, offer to give Dinkel personally, a one-eighth interest in your property?

A. Yes, sir.

13. For what purpose did you offer to give him that one-eighth interest?

A. Because he stated and represented to me that he had done a great deal for me, and I ought to remunerate him for it, because the first one-eighth went wholly to the Scotch people.

14. What did Dinkel say about remuneration for his work when he told you that the Scotch company wanted the whole of these interests?

61 A. You mean after he advised me he had turned that over to the Scotch company, too?

15. Yes, sir.

A. He did not state or intimate that he wished anything further for himself.

16. At the time you were making negotiations for this loan, you made a written statement or statements to Dinkel as to the value of your property, including the cattle and the ranch?

A. I expect I enumerated what I had. What there would be as security.

17. What value did you place on that?

A. I don't remember at this time what value I did place on it.

18. Well, about. Didn't you represent your cattle and ranch were worth about two hundred thousand dollars?

A. Probably I did.

19. And did you get Dinkel to make the same representations to the company in order to induce the company to make that loan of $65,000?

A. No, sir. I just stated or showed Mr. Dinkel, the manager of the company, what I had to be given as security.

20. Didn't you also place a valuation on that property at that time?

A. It is very likely I did. I don't remember.

21. Didn't you write a letter to Dinkel stating the kinds of property and the value?

A. I don't remember, but I probably did.

22. Well, then, if that property was worth $200,000, how much would the fourth interest be you offered to give as a bonus for that loan?

A. If the ranch was worth $200,000 it would follow the fourth interest would be worth $50,000.

23. Now, that proposition was not accepted by the company, was it?

62 A. Yes, sir.

24. It was?

A. So Mr. Dinkel told me.

25. That is the only means of your knowing it was accepted, is it?

A. Yes, sir.

26. You are certain Dinkel told you that?

A. Yes, sir.

27. You relied upon that statement of Mr. Dinkel just as much as you did upon any other statement Dinkel ever made to you?

A. I believed him.

28. And that particular contract was never consummated at all, was it?

A. As to giving the interests, no, sir.

29. When you refused to make that contract all negotiations between you and Dinkel were dropped, were they not?

A. There was nothing done right away, but we kept talking about the matter.

30. But so far as carrying out that transaction was concerned, everything was stopped?

A. I told him that I had reconsidered my agreement, and that I would not give a fourth at all.

31. What time of the year did that transaction occur?

A. Well, that was probably along early in September.

32. Of what year?

A. 1886. It may have been in the latter part of August. I don't remember the date exactly. It was in the middle part of the summer or later.

33. When did you begin talking with him about paying the cash bonus?

A. At the time I told him I would not pay him the fourth interest.

34. What did Dinkel say then?

63 A. He said he would not accept that because it was not treating him nor his company right; that the only proper way for me to do was to take the loan as I agreed, and to pay the one-fourth as I agreed.

35. In what way did he say it was not treating him right?

A. As I understood him to mean as the agent or general manager for the Scotch people he had represented to them the loan could be made, and that now it could not.

36. Now, state just exactly what Dinkel said about it, at that time?

A. As near as I could recollect his words were: "We can't consider any such proposition from you at all; it is neither treating me nor the company right."

37. So he told you at that time he could not consider any proposition from you at all?

A. That we cannot.

38. When did you have the next conversation with him in regard to any loan from the company?

A. We were talking about it off and on all the time, every day or two, or every three days.

39. Didn't you have a conversation with him on or about the 23d of September, in regard to this loan?

A. I was talking with him often from the time I concluded not to give the one-fourth interest up to the time the loan was made.

40. What occurred during these conversations?

A. Well, he kept insisting I ought to take the loan on the terms we had agreed upon.

41. Did Dinkel, during any of these conversations, agree to take the cash bonus at all?

A. Yes, sir, he told me he was authorized to take the cash bonus.

42. I want you to confine yourself prior to the time of the actual consummation of the loan. What occurred during these
64 conversations in regard to a cash bonus. Didn't he, in all his conversations, prior to the 23d of September, 1886, refuse to take a cash bonus?

A. A short time after I refused to give the one-fourth interest, at which time I offered the company $6,500 in cash to take the place

of the one-fourth interest; not long after that I offered him an additional two thousand dollars in notes, which was understood should be his own.

43. Up to and within two days of the actual consummation of this transaction hadn't Dinkel always refused to accept you proposition to take the cash bonus?

A. No, sir, it was an earlier day than that he agreed to take it.

44. In what shape did the transaction finally shape itself?

A. I offered him the two thousand dollars in notes which would go to himself, and the $6,500 in cash which was to go to the company, and I replace the one-fourth interest I had been going to give, and date the notes the 20th of August, and it was accepted in that way.

45. Where did that transaction occur?

A. It was consummated, I believe, in Mr. Vincent's office. That is, Mr. Vincent met me on the street and asked me what the trouble was between me and Dinkel in reference to getting the Scotch loan. I told him I had agreed to give a one-fourth interest, and that after mature consideration I concluded that was too much, and that I had finally decided not to give it, but that I had offered $6,500 to take the place of that, and that I was going to give Dinkel $2,000 in notes for himself. I think I had this talk with him on the street, and I think he asked me to come to his office and said he would see Dinkel. I went to his office and we had a talk about it, and I related this again to him, and he said, I think that is enough, and I will see Dinkel about it. I don't know whether it was the same day, but soon afterwards, to the best of my recollection, Vincent asked me to go to the office again, and he advised me there that Dinkel would accept that proposition.

46. Now, just before you saw Vincent, you had made this proposition to Dinkel, and Dinkel refused to accept it?

A. No, sir, after I added the two thousand dollars in notes, which was to go to himself, he neither said he would or would not accept it, and it was resting there when I had this talk with Vincent.

47. Why did you say, when Judge Vincent asked you what the trouble was between you and Dinkel, why did you say what you had offered him and that he would not accept it?

A. He had not accepted it, and I so told Vincent that he had not accepted it.

48. That was the trouble then, was it, that Vincent referred to?

A. He knew there was a hitch in the loan, I suppose.

49. Now, what was that hitch?

A. That I had refused to pay the one-fourth interest.

50. Then you mean to say that just a short time before this loan was finally consummated, that you made to Dinkel this proposition to give him $6,500 in cash, and two notes to him personally, and that Dinkel refused to accept that, but still insisted on the one-fourth interest; is that the way the thing occurred?

A. My proposition was that the $6,500 took the place of the one-fourth interest which went to the Scotch people, and the two thousand dollars was to be his own, personally.

51. And that he refused to accept?

A. No, sir. After I told him I would add the $2,000 in notes, which would be his own, he neither accepted or refused the proposition, he made no response.

66 52. Didn't you, either in the morning of the 23d of September, or some time prior thereto, make an appointment to meet Mr. Dinkel in his office at two o'clock in the afternoon of the 23d of September, to finally decide whether that loan should be consummated or not?

A. I don't remember.

53. A short time before you saw Judge Vincent, I mean the same time when Judge Vincent spoke to you about this trouble you had been having with Dinkel, had you not had a conversation with Dinkel in regard to this matter in Dinkel's office?

A. I probably did. I talked with him several times, as I have stated.

54. Well, then, two hours prior to your conversation with Judge Vincent, your first conversation with him about this, hadn't you been talking with Dinkel in Dinkel's office about this loan?

A. I don't know, it is quite probable, though.

55. Well, on the same afternoon you had your first conversation with Judge Vincent in regard to this matter, hadn't you made this same proposition to Dinkel and Dinkel refused to accept it?

A. I don't remember whether I had any talk with him that day or not.

56. Now, after you began your conversations with Judge Vincent, in what way did you communicate with Dinkel after that in regard to this loan?

A. I was in Vincent's office, and after I stated what had been offered, Vincent said he thought that was enough, and he said, you may give that proposition to me again and make it in writing, and Vincent blocked out the proposition I had made, and he said he would send it to Dinkel or carry it to him and see him about it.

57. And that writing you made, did you?

A. Yes, sir. Vincent blocked it out in pencil and I copied it.

58. Did you receive any reply from Dinkel in regard to that proposition?

67 A. My recollection is that Mr. Vincent informed me the proposition was accepted.

59. As a matter of fact, didn't Dinkel write on the same piece of paper some modification of the transaction, and then you afterwards accepted the modification suggested by Dinkel?

A. I don't remember as to that.

60. But anyhow, after you began to talk with Judge Vincent about this transaction, from that time until the transaction was consummated by the making of the proposition and acceptance of it in writing, you never had any other verbal conversations with Mr. Dinkel, did you?

A. I was talking with him every day or two.

61. From the time you made this proposition to Dinkel in writing and before you received Dinkel's reply and the proposition was

closed up between you and Dinkel by this correspondence did you have any verbal conversations with him?

A. It seems to me I did, but I am not sure about it.

62. Now, is it not true that that transaction occurred in this way: That you wrote out your proposition to Dinkel and that Judge Vincent carried that proposition to him, and that Judge Vincent brought back a written reply from Dinkel, and then you accepted that proposition, and the matter was closed up when you received the reply from Dinkel?

A. After telling Vincent what the proposition was he said, "You better put that in writing and give it to me." He blocked it out and I copied it, and I am not sure which of them told me the proposition was accepted, although I think Vincent told me the proposition was accepted, but I don't remember for sure.

63. You did not have any verbal conversations with Dinkel in regard to it, did you, after you made that written proposition and before Vincent told you it was accepted?

68 A. I don't remember that I did have any talk with him.

64. Now, Mr. McBroom, when was it that Dinkel told you that the Scotch company had authorized him to make this particular loan and take that bonus?

A. I have not got any dates, but I rather think it was along the middle of September or the latter half of September.

65. Do you mean to say that in the middle of September, or the letter half of September, that Dinkel told you the Scotch company had authorized him to take this $6,500 bonus?

A. I rather think it was the latter part of September he told me so.

66. Now, do you mean to say he told you that any time prior to the time you had the conversation with Judge Vincent?

A. Yes, sir. He told me he was authorized to get as large a cash bonus as possible.

67. He told you that before you saw Judge Vincent?

A. Yes, sir.

68. Well, why did you say awhile ago that Dinkel refused to accept this proposition, and still insisted on getting a one-fourth interest in the property for the company?

Q. As I have stated, it was after the middle of September that he told me he was authorized to get as large a cash bonus as possible, or get as good a thing as possible out of it in cash, that the company had written to him to that effect.

69. Now, was that before or after you had your conversation with Judge Vincent in regard to this?

A. I think it was just shortly before.

70. Now, will you please explain to the jury again, why it is on the very afternoon you had your conversation with Dinkel and before you talked with Judge Vincent, that Dinkel had refused

69 to accept this proposition, and still insisted on getting the one-fourth interest in your property as a bonus?

A. He said the only decent thing for me to do for him was to pay him the one-fourth interest.

71. For what services did Dinkel claim he should be remunerated?

A. Well, at the time I agreed to give him the second one-fourth interest, he said, "I have done a good deal for you, and this one-eighth interest has been turned over to the Scotch people, and I got nothing out of it of course, and you ought to do something for me."

72. What had he been doing for you that he should get anything?

A. I presume he thought I needed the money bad, and I would be willing to pay almost anything to get it.

73. That is not responsive to the question. What did he claim to have done for you that you should pay him anything?

A. He did not enumerate what he had done.

74. You stated in your direct examination this morning, that when you first approached Dinkel in regard to the obtaining of this loan of $65,000, that Dinkel told you the company did not make loans over $30,000; that he was not authorized to make loans over $30,000, that is true, is it?

A. Yes, sir.

75. And you testified subsequently that Dinkel told you that he thought he could induce the company to make the loan of $65,000, didn't he?

A. Yes, that they could be induced to do it.

76. Now, was not this part which he was to get the compensation for his services in inducing the company to make this loan?

A. No, sir, he always said it went direct to the company. He said so then and afterwards.

77. Answer my question. Was not this interest to go to him for his services in inducing the company to make you that loan?

A. I did not so understand it.

78. What services other than those had he ever rendered you for which you should compensate him?

A. He did not state what he had done. I believe he mentioned he had been trying to get the loan for me.

79. Didn't Dinkel also tell you he was not authorized to make loans on cattle?

A. No, sir, I don't remember that he did. He may have said that, but I don't remember.

80. Was not this compensation to be paid to Dinkel for the two things, inducing the company to make as large a loan as $65,000, and for inducing the company to make a loan on cattle, and that this compensation was to pay him for his services in doing that?

A. No, sir. I don't understand that he got any part of it, that the company got all of it.

81. I am speaking about that one-eighth interest now.

A. Yes, sir.

82. Didn't he claim he was entitled to that one-eighth interest for his services in inducing the company to make a loan of that amount on cattle?

A. He claimed something ought to be given to him, and induced me to give him this second one-eighth.

83. Can you tell why these notes were dated back to the 20th of August and the loan was actually made on the 25th of September? Did not Dinkel tell you that that was done because he had had the money there all that time on the strength of your statement that you would make the loan?

A. I don't remember whether he said that or not. I agreed that they should be dated back though.

84. What was said by Dinkel to induce you to date the notes back?

A. I don't know as I can recollect now.

71 85. Was there not some reason given for it?

A. I may have made the proposition myself when I offered the $6,500 to date the notes back.

86. Don't you know, Mr. McBroom, that that $65,000 had been here for some time prior to the actual execution of these notes?

A. No, sir; I do not. I don't remember that it was any great while before that. I don't remember when the money was here.

87. You don't remember at all why that note was dated back to the 20th of August, do you?

A. I remember in a general way it was part of the inducement as much as the $6,500 in cash they were getting.

88. You are satisfied of that, are you?

A. And I may have made the proposition.

89. I don't want to know what you may have done. I want to know what you actually did do. Why were these notes dated back to the 20th of August?

A. I don't know as I recollect why it was done.

90. Still, you say that you know it was a part of the consideration for obtaining that loan, do you?

A. I mean to say I did not know that the money was there then.

91. Now, answer my question. For what reason were those notes dated back to the 20th of August?

A. I don't recollect what the reason was.

92. Then you don't know that those notes were dated back to the 20th of August as a consideration of the making of this loan?

A. Yes, it was a part of the consideration, but I don't remember. It seems that the money was there on the 20th of August, and hence it was agreed that the notes should be dated back to that date.

93. Didn't you say you made your final proposition in writing, and that that was the proposition that was accepted. Now, was

72 the condition that those notes should be dated back contained in that written proposition?

A. I rather think it was, but I am not sure.

94. You don't remember the particular reason why these notes were dated back?

A. No, except that it was a part of the consideration.

95. Now, Mr. McBroom, you stated in your direct examination that you received one $6,500 check from Mr. Dinkel, and that that

check was handed back to Mr. Dinkel, didn't you, after it had been endorsed by you?

A. I am not sure whether it was handed to Vincent or Dinkel. I think it was Dinkel.

96. Then you don't remember whether you gave the check to Judge Vincent or Mr. Dinkel, do you?

A. No, sir; my impression is it was Dinkel, but I am not positive.

97. Didn't you state in your direct examination, this morning, that Dinkel handed you that check and said, "Here, endorse this," and you endorsed it and handed it back to him, or that Dinkel had hold of it all the time?

A. That was what I said, I think.

98. Now, you say you don't recollect whether that was true or not?

A. I think I said this morning in my direct examination I was not sure which one of them it was.

99. Where do you reside?

A. At Fort Sumner. That is my post office, I don't live right there.

100. What is the name of your ranch where you reside?

A. "Conevah."

101. Did you reside there in 1886?

A. Yes, sir.

102. Was that tract of land included in this mortgage here that you gave to the Scotch company?

73 A. Yes, sir.

103. Mr. McBroom, at any time before the commencement of this suit, did you assign to anybody your interest in this claim against the defendant?

Objected to by complainant's counsel as immaterial.

Objection overruled by the court.

Exception reserved by complainant's counsel.

A. No, sir, I assigned it afterwards.

104. To whom did you assign it after this suit was brought?

A. To Browne & Manzanares.

105. How long after the suit was brought?

A. It was not a great while. I think some time in the month of October.

106. The October immediately following the September when the suit was brought?

A. Yes, sir.

107. So that now you have no direct interest in this claim at all?

A. No, sir.

108. And you have not had since October, 1889?

A. No, sir.

109. Now, in all your testimony, both direct and cross examination, have you given in substance all the material facts in connection with this loan?

A. I think so, sir.

Redirect examination by FRANK SPRINGER:

1. Mr. McBroom, you stated in answer to a question by Mr. Jones, that you had made no payment upon this loan beyond the $2,842.19 interest note; now, state to the jury what became of the mortgaged property.

Objected to by defendant's counsel as immaterial, incompetent and on the ground that the same tends to show transactions after the commencement of this suit which must regulate actions of the party in it.

74 Objection overruled.
Exception reserved by defendant's counsel.

A. The Scottish Mortgage Company from whom I got the loan sold under both mortgages, both the chattels and real estate.

2. How much of the property did they sell?

A. They sold all the stock and all the real estate.

Counsel for defendant object to the question and answer on the grounds above stated.

Objection overruled.

Exception reserved.

3. You stated also in answer to a question of Mr. Jones that you were not entirely certain whether you handed the $6,500 check to Mr. Vincent or Dinkel. I will ask you to state whether they were both present at the time?

A. Yes, sir, they were both present.

Recross-examination by A. A. JONES:

1. Was that sale of the personal and real property made after the commencement of this suit?

A. A good while after.

(Mr. JONES:) Now, if the court please, we move the court to take from the jury all the testimony of the witness in reference to the sale of this property for the reason that the testimony shows it occurred after the commencement of this suit and the status of the parties was fixed at the time the suit was brought and anything that occurred subsequent thereto cannot vary the rights of the parties.

(Mr. SPRINGER:) I did not think the inquiry in the first place was a material one, but they having brought out and got before the jury evidence for the purpose of prejudicing the jury, that no payment had been made on the note, I think it is competent to show the mortgaged property has been taken and payment made in that way.

75 Motion overruled.
Exception reserved by defendant's counsel.

Testimony of Hugh Loudon.

Direct examination by Mr. SPRINGER:

1. What is your name?
A. Hugh Loudon.
2. Where do you reside?
A. In East Las Vegas.
3. Are you in any way connected with The Scottish Mortgage and Land Investment Company, the defendant in this suit?
A. I am.
4. What position do you hold in that company?
A. Manager and agent.
5. Were you connected with the company in the month of September, 1886?
A. I was.
6. In what capacity?
A. Accountant.
7. Who was the general manager of that company in September, 1886?
A. George J. Dinkel.
8. Where was the principal place of business of that company in New Mexico, at that time?
A. In East Las Vegas, New Mexico.
9. What other officers did that company have at that time?
A. None others.
10. Who had the general charge of the company's business in New Mexico at that time?
A. George J. Dinkel.
11. Were there any directors of that company living in New Mexico at that time?
A. No, sir.
12. Was there any kind of a consulting board or advisory board?
76 A. Yes, sir.
13. Who constituted it?
A. Jefferson Raynolds, Charles Blanchard and William A. Vincent.
14. What were these gentlemen called in connection with the company?
A. Advising board.
15. What other officers did the company have elsewhere?
A. No other officers in New Mexico.
16. Did they have any officers anywhere else?
A. In the old country, in Scotland.
17. What officers did they have there?
A. The head office of the company was in Glasgow, Scotland, and they had the board of directors there.
18. Who was the president of the company?
A. Mr. McKenzie.
19. What was his full name?

A. Colin J. McKenzie.
20. Who were the board of directors at that time?
A. I don't remember.
21. Do you remember any of them?
A. Yes, sir.
22. Name some of them, will you?
A. Mr. Muirhead, Mr. Carson, Mr. Blythe, Mr. Cross. I cannot remember exactly as to the others.
23. Who attended to the business of the company at its headquarters in Scotland, at that time?
A. Messrs. Carson and Watson.
24. What position did they occupy?
A. Managers.
25. Where was their office?
A. St. Vincent street, Glasgow, Scotland.
26. Are you acquainted with Messrs. Carson and Watson?
A. Yes, sir, I know them both.
27. Were you acquainted with Colin J. McKenzie, the president?
77 A. Yes, sir.
28. Is that the signature of Mr. McKenzie on that paper? (Handing witness paper.)
A. I believe it to be so.
29. Examine the signature to that paper, and see if you can tell me whose it is?
A. Yes, sir, I know the signature.
30. What signature is that?
A. The signature of the firm of Carson & Watson.
31. Who were Carson & Watson?
A. Managers of the company in Scotland.

(Mr. SPRINGER:) If the court please, I will offer this paper in evidence. (the paper was here marked Exhibit "H.") It is a letter addressed to George J. Dinkel by Messrs. Carson & Watson, managers of the company in Scotland. I offer it for the purpose of showing direct authorization of this loan by the home office of the company.

(Mr. FISKE:) We will make a formal objection to it that it is incompetent, immaterial and hearsay.

Objection overruled by the court.
Exception reserved by defendant's counsel.

32. (Mr. SPRINGER:) Before I read this letter to the jury I desire to ask Mr. Loudon a further question. I will ask you whether or not at that time cablegrams between the home office and the office here were transmitted in cipher?
A. Frequently so.

(Mr. SPRINGER:) I will now read the letter in evidence.

(Mr. JONES:) We object to the letter being read in evidence, for the reason that it is something that was undoubtedly received after the transaction occurred. It is dated in Scotland on the 23d of

September, 1886, and it is impossible for it to have arrived here until after this transaction took place.

Objection overruled.

78 Exception reserved by defendant's counsel.

(Mr. JONES:) We will ask the court to instruct the jury that anything contained in this letter is admitted in evidence only for the purpose of showing a ratification of the transaction and for none other.

(The COURT:) It has not been read, and I do not know the contents of it.

(Mr. SPRINGER:) I will now read the letter.

EXHIBIT H.

The Scottish Mortgage and Land Investment Company of New Mexico (Limited), 150 St. Vincent Street.

GLASGOW, 23 *Sept.*, 1886.

Carson & Watson, chartered accountants.

Geo. J. Dinkle, Esq., the Scottish Mortgage and Land Investment Company of New Mexico (Limited):

(Mr. SPRINGER to court:) There are certain cipher words, the translation of which is in words contained in the letter.

DEAR SIR: The board very carefully considered your cablegram of the 20th inst., at a meeting held to-day, and finally instructed us to transmit you the following cablegram, which we have done, viz: "McBroom damp (the board sanctions a loan of) apron (thirty thousand dollars) first mortgage lamitable (at ten per cent.) or arsenic apace (sixty-five thousand dollars) lamprey (at twelve per cent.) decline fourth interest but get best cash bonus possible instead, or get third party to buy fourth interest and pay us."

The board did not see their way to accept the proposal you cabled. As we stated in our letter of 5th August, the board, with the very limited information at their command regarding the working

79 of the undivided interest principle, did not feel disposed to be mixed up in any way as a partner of McBroom, not knowing into what trouble and responsibilities it might lead. But it occurred to the board that you might in some way accept the one-fourth interest from McBroom, having previously arranged to dispose of it at once to some one who would take it off your hands, freeing us of all responsibility and paying us a handsome price, which we would treat as a bonus upon the loan; or else McBroom himself, would give a good bonus if we relinquished the one-fourth interest. We trust our cablegram has made this quite clear to you. We are very sorry you have had so much trouble in connection with this loan; but we trust you will find the terms of our cablegram workable.

We shall write you regarding the other matters in your recent letters at length in a day or two.

Yours truly, CARSON & WATSON.

33. (Mr. SPRINGER to witness Loudon:) Examine this paper, and see if you know the signature signed to it.

A. I know the signatures of the principals.

34. What signatures are they?

A. The signatures of Carson & Watson and George J. Dinkel.

35. Is that the signature of the same Carson & Watson who you testified were managers of the company in Scotland?

A. It is a different signature from the signature in the letter, but I believe it to be the signature of the same parties. This is the agreement between the company and Dinkel in regard to his position as manager.

(Mr. JONES:) If the court please, this instrument contains the statement that all bonuses and penalties received shall be paid to the company. The instrument shows that it was made in October, 1882, and that being prior to the passage of the present usury
80 law cannot be evidence in this case against the company as to any transaction involving the question of usury after the passage of the new law, and the reason I object to it is that a power to an agent to do a transaction, if that transaction afterward becomes unlawful there is no presumption that that authority to the agent to perform the particular act continues, but the presumption is that it is discontinued; and the instrument in question is no evidence that at the time of the transaction involved in this suit that the agent Dinkel had any authority to receive a bonus or exact any commission or penalties, and it is incompetent, irrelevant and immaterial.

Objection overruled.

Exception reserved by defendant's counsel.

(Mr. JONES:) We object for the further reason that Carson & Watson who signed that agreement themselves, were mere agents of the company, and that there is nothing in the testimony to show that they were authorized to authorize an inferior agent to do an illegal act.

Objection overruled by the court.

Exception reserved by defendant's counsel.

The paper just shown to the witness was here introduced in evidence and marked Exhibit I, and was read to the jury as follows:

EXHIBIT I.

This agreement entered into between Carson & Watson, chartered accountants in Glasgow, managers and secretaries, and as authorized by and taking burden on them for the Scottish Mortgage and Land Investment Company of New Mexico (Limited), incorporated under the companies' acts 1862 to 1880, hereinafter called "the

company," of the first part, and George Jaspar Dinkle, of the city of Las Vegas, in the Territory of New Mexico, in the United States of America, bank manager, for himself, and taking burden upon him for Clinton R. Browning, also of the said city, real-
81 estate and insurance agent, hereinafter called "the managers," of the second part:

Witnesseth: That the company have appointed and do hereby appoint the said George Jaspar Dinkle and Clinton R. Browning to be local managers for the said company in the said Territory of New Mexico, or in such other place or places as from time to time may be agreed upon, and that upon the following terms and conditions, viz:

First. The managers shall give their best attention to the business of the company, endeavoring by every means in their power to advance its interests; and they shall obey all lawful and reasonable instructions for the conduct of the business, which may from time — be given them by the company.

Second. They shall not act as managers or agents for any company engaged in a similar business to that of the company without the written consent of the directors of the company, but shall not be otherwise restricted as to the business they may enter into.

Third. Power is reserved to the company from time to time to appoint a clerk and send him from Scotland to occupy the position of principal clerk and book-keeper in their office at Las Vegas, but his duties shall be fixed by the managers, and he shall be subject to the authority and instructions of the managers, who shall be entitled to discharge him on three months' notice, intimation thereof being forthwith given to the company. The managers shall be entitled, free of charge, to the services of the said clerk, so far as not required for the business of the company.

Fourth. The remuneration to the managers shall be two thousand five hundred dollars, United States currency, per annum of fixed salary, payable monthly, with in addition two hundred and fifty dollars for every one per cent. over five per cent. of net profit earned by the company in each financial year, whether divided
82 amongst the shareholders as dividend or not, but it is hereby agreed that the whole remuneration for any financial year shall not exceed five thousand dollars; but declaring that in computing the net profit of the company, premiums on the issue of stock shall not be included; and it is understood that all commissions on loans by the company and all bonuses or penalties payable by borrowers from them in respect of such loans shall belong to the company; all salaries, office rent, taxes, traveling expenses and other charges necessary in the conduct of the business shall be paid by the company.

Fifth. The managers shall not without the written consent of the company lend the funds of the company on the security of any property in which they are personally interested, and shall not without such consent sell any such property to the company or be interested in the purchase of any property from the company.

Sixth. The managers shall give to the company bonds with se-

curity to the satisfaction of the directors of the company for the due performance of their duties under this agreement to the extent of five thousand dollars each, and they undertake that so long as they are managers they shall retain one hundred shares each in the company.

Seventh. This agreement shall remain in force for three years from the first day of September, in the year eighteen hundred and eighty-two, and either party may terminate it then or at any subsequent period on giving six months' previous notice.

Lastly. Both parties agree to implement their respective parts of the premises and consent to registration hereof for preservation and execution. In witness whereof these presents written on stamped paper by Alexander Terris, clerk to Dill, Wilson and Muirhead, writers in Glasgow, are together with two duplicates, subscribed by the parties at Glasgow as follows, viz: By the said Carson
83 and Watson, the signature of the said firm being adhibited by David Simpson Carson, one of the partners of said firm, on the nineteenth day of October, in the year eighteen hundred and eighty-two, before these witnesses James Wyse Maxwell and Andrew William Crosthwaite, both clerks to the said Dill, Wilson and Muirhead: and by the said George Jaspar Dinkle, otherwise George Jaspar Dinkel, on the twentieth day of said month and year, before these witnesses, the said James Wyse Maxwell and the said Alexander Terris.

CARSON & WATSON.
GEO. J. DINKEL.

JAS. W. MAXWELL, *Witness.*
A. W. CROSTLEWAITE, *Witness.*
JAS. W. MAXWELL, *Witness.*
ALEX. TERRIS, *Witness.*

(Endorsed:) Dated 19th and 20th October, 1882. The Scottish Mortgage and Land Investment Company of New Mexico (Limited), and Dinkle and Browning: Agreement. Dill, Wilson & Muirhead, writers, Glasgow.

(Mr. SPRINGER to witness:) Examine this letter which I now hand you, and state if you know that signature?

A. Yes, sir.

36. Whose signature is that?

A. The signature of Colin J. McKenzie.

37. What position in the company did he hold at the date that letter was written?

A. President.

38. In whose handwriting is the body of that letter?

A. I am not acquainted with it.

(Mr. SPRINGER:) I will offer this letter in evidence. It is a letter directed to Mr. Dinkel, dated August 22nd, 1886, and signed by Colin J. McKenzie.

(Mr. FISKE:) We will make a formal objection to its introduction: that it is incompetent, irrelevant and immaterial, and it is not

shown that the president had the authority to bind the corporation by making any such statements, and any such statements
84 made by the president in regard to transactions here are incompetent, irrelevant and immaterial and beyond his power.

Objection overruled by the court.
Exception reserved by defendant's counsel.
The letter was here marked Exhibit J, and is as follows:

EXHIBIT J.

AUGUST 2ND, 1886.

DEAR MR. DINKEL: By cable you will have learned that the board have authorized a loan to Mr. McBroom of $25,000, provided it can be made a first charge on his property. It was considered inadvisable for the company to become a partner with Mr. McBroom in his ranch. I am happy to add that at our meeting to-day I was able to obtain the consent of my colleagues to commence making loans on cattle; in all cases there will of course be more or less of real security along with the cattle, but we shall now be able to do a business which we might have embarked in with advantage at an earlier period of our operations. In regard to the McBroom business, I very strongly urged on my colleagues that if we could get the other parties, whom you have already interested, to stand aside, we might give him the whole $65,000 at twelve per cent., and in that event perhaps Mr. McB. might still consider you entitled to a commission. Mr. Carson will write you on this matter, and I hope it may somehow be arranged; for I think it would be a very satisfactory transaction for us; the security is excellent, and you would get your reward. If I could have hoped to place the property as a British company I would gladly have done so, but in the meanwhile that cannot be.

I see that it is to-day reported that the alien bill has been passed by the House of Representatives, and that will cause fresh anxiety and distrust if true.

85 I hope you are all well and that Mrs. Dinkel has quite recovered her strength. With best regards, I am

Yours truly, COLIN J. McKENZIE.

39. (Mr. SPRINGER to witness:) I will ask you another question, Mr. Loudon. How long after September, 1886, did George J. Dinkel remain in his position as general manager in New Mexico?

A. Until the 1st day of June, 1889.

Cross-examination by Mr. JONES:

1. In August and September of 1886 what position in that company, if any, did you hold?

A. Accountant.

2. What were your duties as accountant?

A. Keeping the books of the company.

3. What books did you keep?

A. All the books.

4. State what books you kept. What they consisted of?

A. Cash book, ledger, journal, loan register, loan ledger, insurance register, letter books and various other minor books.

5. Did you keep a record of all money transactions made by the New Mexico branch of this company?

A. Yes, sir; so far as the items were made in the office.

6. It was customary then for all loans that were made by the company, and moneys paid to the company in New Mexico, for entries of all such transactions to be made on these books which you kept, was it not?

A. Yes, sir.

7. Well now, state whether or not Mr. Loudon, there was ever any entry made by you in any of these books of any bonus having been paid by Mr. McBroom for that loan?

A. No, sir.

8. Did you ever know that any bonus was paid to the company by McBroom?

86 A. No, sir.

9. Did Mr. Dinkel ever tell you that he had received any bonus for the company from McBroom?

Objected to by plaintiff's counsel on the ground that the question is not proper cross-examination and is immaterial.

(The question was withdrawn by Mr. Jones.)

10. Was any entry ever made in these books of the McBroom loan at all?

Objected to by plaintiff's counsel.

Objection overruled.

Exception reserved.

A. Yes, sir.

11. State what it was?

Objected to by plaintiff's counsel on the ground that the books are the best evidence.

Objection sustained by the court.

12. With reference to what particular phase of the loan were entries made.

Objected to by complainant's counsel.

Objection sustained.

Exception reserved by defendant's counsel.

Testimony of Robert L. M. Ross.

Direct examination by Mr. FRANK SPRINGER:

1. Are you deputy probate clerk and recorder for this county?

A. I am.

2. I will ask you whether you have in your charge these papers pertaining to the articles of incorporation of the Scottish Mortgage and Land Investment Company?

A. These papers have been filed in the clerk's office, and are in the custody of the clerk.

3. State whether you produced them from the files in your office.

A. Yes, sir.

87 (Mr. SPRINGER to court:) I will offer in evidence these several papers, the certificate of incorporation of the Scottish Mortgage and Land Investment Company of New Mexico (Limited); certificate of appointment of George J. Dinkel, of Las Vegas, as manager in the United States, for the Scottish Mortgage and Land Investment Company; memorandum and articles of association of the Scottish Mortgage and Land Investment Company of New Mexico (Limited), and a certificate by Colin J. McKenzie, president of the company, to the effect that he files these papers as connected with the incorporation of the company; and this other book is a copy of the laws of Great Britain under which the company is organized, required to be filed under our laws governing foreign corporations.

(Mr. JONES:) We will offer an objection on the ground that the documents they desire to introduce in evidence are not properly authenticated and certified.

Objection overruled.

Exception reserved by defendant's counsel.

The papers identified by witness were introduced in evidence and marked respectively Exhibits K, L, M and N, and are as follows:

EXHIBIT K.

Certificate of the Incorporation of a Company.

I hereby certify that the Scottish Mortgage and Land Investment Company of New Mexico (Limited), was incorporated under the companies' acts 1862 to 1880 as a limited company, on the twenty-sixth day of September, one thousand eight hundred and eighty-two.

Given under my hand at Edinburgh, this twentieth day of January, one thousand eight hundred and eighty-three.

JOHN J. REID,
Register of Joint Stock Companies for Scotland.

Companies' act, 1862, sec. 174.

GLASGOW, *23d April*, 1883.

88 This copy certificate of incorporation forms Exhibit Number Two, referred to in my affidavit of this date

COLIN J. McKENZIE,
Chairman or President.

W. GIBSON,
U. S. Vice and Deputy Counsul, Glasgow, Scotland. [SEAL.]

I, James Aiken, of the city of Glasgow, Scotland, writer and notary public, do hereby certify and make known that the fore-

going certificate of incorporation of the Scottish Mortgage and Land Investment Company of New Mexico (Limited), is genuine; and that the signature, "John J. Reid," subscribed thereto, is the signature of the register of joint stock companies of Scotland.

In testimony whereof, I have hereunto set my hand and [SEAL.] seal this twenty-second day of January, in the year eighteen hundred and eighty-three.

[Suum cuique.]

JAMES AIKEN,
Notary Public.

UNITED STATES CONSULATE, }
Glasgow, Scotland, } *ss:*

I hereby certify that James Aiken, whose genuine signature appears at the foot of the foregoing certificate, dated the twenty-second day of January, eighteen hundred and eighty-three, is a notary public in and for Scotland, duly commissioned and qualified; and that at the time of signing he was duly authorized; and that all his official acts as such notary public are entitled to and ought to have full faith and credit.

Witness my hand and consular seal this twenty-fourth [SEAL.] day of January, eighteen hundred and eighty-three.

W. GIBSON,
Vice and Deputy Consul of the United States of America at Glasgow.

89 (Endorsed:) Certificate of incorporation of the Scottish Mortgage and Land Investment Company of New Mexico (Limited), dated January 20th, 1883.

TERRITORY OF NEW MEXICO, }
County of San Miguel. }

I hereby certify that the within instrument was filed for record on the 16th day of June, 1883, at 12 a. m., and was duly recorded the same day in Book No. 23, pages 551 and 552.

JESUS M. TAFOYA,
[SEAL.] *P. C. and Recorder.*

EXHIBIT L.

To whom it may concern:

This is to certify that "the Scottish Mortgage and Land Investment Company of New Mexico (Limited)," a corporation duly incorporated, and existing under and by virtue of the laws of Scotland, has appointed and designated Las Vegas, in the county of San Miguel and Territory of New Mexico, in the United States of America, as its principal place where the business of said company in said Territory, shall be carried on, and George Jaspar Dinkel as the authorized agent of said company, resident of said place, upon whom any process against said company may be served.

In testimony whereof, the said "The Scottish Mortgage and Land

Investment Company of New Mexico (Limited)," has caused the corporate seal of said company to be hereto affixed, and these presents to be signed respectively by its chairman or president, and managers and secretaries, on this the twenty-third day of April, eighteen hundred and eighty-three.

COLIN J. McKENZIE,
Chairman or President.

[SEAL.]

CARSON & WATSON,
Managers and Secretaries.
D. S. CARSON.
LAURENCE H. WATSON.

90 City of Glasgow, county of Lanark, in that part of the United Kingdom of Great Britain and Ireland called Scotland:

Be it remembered, that on this twenty-third day of April, A. D. one thousand eight hundred and eighty-three, before me, the undersigned, a notary public, in and for Scotland aforesaid, personally came Colin James McKenzie, chairman or president, and David Simpson Carson and Laurence Hill Watson, secretaries and managers, to me well and personally known as the same persons whose names are subscribed to the foregoing deed, and as parties thereto, and acknowledged that they signed, and executed the within instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

Witness my hand and seal the day and year above written.

[Suum cuique.]

[SEAL.]

JAMES AIKEN,
Notary Public.

UNITED STATES CONSULATE,
Glasgow, Scotland.

I hereby certify that James Aiken, whose genuine signature appears at the foot of the foregoing certificate, dated the twenty-third day of April, eighteen hundred and eighty-three, is a notary public in and for Scotland, duly commissioned and qualified; and that at the time of signing he was duly authorized; and that all his official acts as such notary public are entitled to, and ought to have full faith and credit.

Witness my hand and consular seal, this twenty-third day of April, eighteen hundred and eighty-three.

[SEAL.]

W. GIBSON,
U. S. Vice and Deputy Consul, Glasgow, Scotland.

(Endorsed:) Certificate of appointment of George J. Dinkel, Las Vegas, as manager in the United States for the Scottish Mortgage and Land Investment Company of New Mexico (Limited).

91 TERRITORY OF NEW MEXICO, }
County of San Miguel. }

I hereby certify that this instrument was filed for record on the 16th day of June, 1883, at 12 o'clock a. m., and was duly recorded in Book No. 23, pages 552 and 553, this 19th day of June, 1883.

JESUS M. TAFOYA,
[SEAL.] *P. C. and Recorder.*

EXHIBIT M.

[SEAL.]

Memorandum of Association of the Scottish Mortgage & Land Investment Company of New Mexico (Limited).

I. The name of the company is the Scottish Mortgage and Land Investment Company of New Mexico (Limited).

II. The registered office of the company will be situate in Scotland.

III. The objects for which the company is established are:

1. The investment of money on loan on the security of real or heritable or of leasehold estate situated in the United States of America, or of any interest therein.

* * * * * * *

5. The investment of money on loan on the security of cattle sheep or other live stock, and movable goods and chattels, in the United States, and the doing of all the acts necessary for the profitable realization or employment of such securities.

* * * * * * *

Powers of Directors.

59. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may do all the acts mentioned in the
92 memorandum of association, and may exercise all such powers of the company as are not by the companies' acts, 1862 to 1880, or by these articles, required to be exercised by the company in general meeting, subject, nevertheless, to any regulation of these articles, to the provisions of the foregoing acts, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors, which would have been valid if such regulation had not been made. The directors are empowered to appoint a manager or managers, and secretary or secretaries, and other necessary officers, except as after provided in the case of auditors, with such powers and duties as they may from time to time prescribe. The same person or persons may hold both offices of manager and secretary. The board may appoint a temporary substitute for their chairman or for the manager or secretary,

who shall for the purposes of these articles be deemed the chairman or manager or secretary during the period of such appointment.

* * * * * * *

Advising Board.

104. The directors may appoint one or more advising boards in America, consisting of such number of gentlemen resident in the United States as they may consider expedient, and may pay such advising board or boards such remuneration as may be agreed on. Any director of the company shall be eligible as member of an advising board.

105. The directors may from time to time make such agreement with, confer such powers and duties on, give such directions to, and make such regulations for the conduct of business by the advising boards, as they may judge expedient, and the members of such advising boards shall in every respect conform to any such agreement, directions or regulations. The directors may at any time,
93 subject to such agreement, break up, or alter the constitution, powers, or duties of any advising board.

106. No one shall be a member of any advising board who is not a shareholder of the company.

* * * * * * *

EXHIBIT X.

I, Colin James McKenzie, of Portmore, Eddleston, in the county of Peebles, Scotland, chairman or president of the Scottish Mortgage and Land Investment Company of New Mexico (Limited), incorporated under and by virtue of the laws of Great Britain and Ireland, and having its registered office situate within number one hundred and fifty Saint Vincent street, Glasgow, Scotland, do hereby make oath and declare and certify that the after-named documents which have been signed by me with reference hereto are true copies of the originals pertaining to the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), *videlicet* (1) copy, the acts of Parliament 1862 to 1880 under which the said company is registered, marked "Exhibit No. I;" (2) copy certificate of the incorporation of the said company by the registrar of joint stock companies for Scotland, marked "Exhibit No. II," and (3) copy memorandum and articles of association of the said company, marked "Exhibit No. III."

COLIN J. McKENZIE,
President of the Scottish Mortgage & Land Investment Co. of New Mexico Lt.

Sworn at Glasgow, in the county of Lanark, the twenty-third day of April, eighteen hundred and eighty-three, before me,

[SEAL.] W. GIBSON,
United States Vice and Deputy Consul, Glasgow, Scotland.

(Mr. SPRINGER:) I now offer in evidence an affidavit for continuance made in this case in 1890, sworn to by Hugh Loudon,
94 by which this case was continued at the April term last year, stating among other things that at the time the matters referred to in the said declaration are alleged to have occurred the said George J. Dinkel was the general manager of the defendant.

(Mr. FISKE:) We object to his introducing the affidavit when the witness is present, on the ground that it is incompetent, improper and accumulative.

Objection overruled by the court.

Exception reserved by defendant's counsel.

The affidavit was here introduced in evidence, marked Exhibit O, and is as follows:

EXHIBIT O.

In the District Court of the Fourth Judicial District of the Territory of New Mexico, Sitting in and for the County of San Miguel, April Term, A. D. 1890.

W. H. McBROOM
vs.
THE SCOTTISH, ETC., COMPANY. } No. 3486.

Hugh Loudon, being duly sworn according to law, deposes and says: That he is the general manager of The Scottish Mortgage and Land Investment Company of New Mexico (Limited), the defendant in the above-entitled cause, and that said defendant is unable to proceed to trial with said cause at the present term of this court because of the absence from the Territory of New Mexico of George J. Dinkel of Las Vegas, New Mexico, who is a material witness for the defendant in said cause.

That at the time the matters referred to in said declaration were alleged to have occurred the said George J. Dinkel was the general manager of the said defendant and that this affiant has no personal knowledge of the facts complained of in said declaration, and that said Dinkel has not been in the Territory of New Mexico since the institution of said suit. That affiant has not caused a subpœna to be issued for said Dinkel because he knew that he was absent
95 from the Territory, and because he was informed by the attorney for defendant that said Dinkel had informed him that he—said Dinkel—would be present at the trial of said cause. That affiant did not know until Friday, the 25th day of April, 1890, that said Dinkel would not be present at said trial, at which time he was informed by his said attorney that he had seen said Dinkel at Springfield, Illinois, where said Dinkel had been since before the institution of this suit, on Tuesday, the 22d day of April, A. D. 1890, and that said Dinkel then said for the first time, so far as this affiant knows, that he could not be present at said trial.

Affiant further states that he believes said witness will prove that no such sums were ever paid to defendant as in said declaration alleged, or in any manner received by it, or by any one for it, and

this affiant believes the same to be true and knows of no other witness by whom such facts can be fully proved.

Affiant further states that he believes the attendance of said Dinkel, or his deposition can be obtained for the next term of this court, and that said Dinkel has not been connected with said company since some time before the institution of said suit.

HUGH LOUDON.

Subscribed and sworn to before me this 26th day of April, A. D. 1890.

[SEAL.] A. A. JONES,
Notary Public.

Testimony of John D. W. Veeder.

Direct examination by Mr. FRANK SPRINGER:

1. Have you computed the interest on $13,000 from September 24th, 1889, to the present time at six per cent. per annum?

(Mr. FISKE:) We object to this question. This is a suit for penalty and there is no interest on penalties; all the law gives
96 him is in the statute; it gives him penalty; there is no interest to be computed on this at all. I have another objection that the $13,000 is not the measure of damages in any case of this kind under the statute; that it is the excess and not double the amount of the interest that is recoverable, and I object to any interest being proven because the law does not give it.

Objection sustained by the court.

Plaintiff rests.

(Mr. FISKE:) The defendant now moves the court to direct the jury to find a verdict for the defendant. We desire some time to prepare our motion, and will be prepared to present it in the morning.

An adjournment was here taken until 9 a. m.

Court convened pursuant to adjournment.

(Mr. FISKE to the court:) We now file our motion asking the court to instruct the jury to find for the defendant. The motion is quite voluminous. The two principle reasons why I ask your honor to instruct the jury to find for the defendant are, first: that this suit is not being prosecuted in the name of the real party in interest, an assignment of all right, title and interest having been made by the plaintiff, McBroom, to Browne and Manzanares. My second reason is that there can be no usury under such a statute as ours until the principal legal interest and something more than usurious interest has been paid. I will read our motion to your honor.

In the District Court, County of San Miguel, April Term, 1891.

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED).

Now comes the defendant in the above-entitled cause and moves the court to instruct the jury to find for the defendant in this cause, because:

97 1st. The plaintiff has failed to show any cause of action against the defendant, and no cause of action is shown by the evidence to have accrued to the plaintiff.

2d. The plaintiff has failed to show that any usurious interest has been paid by plaintiff to the defendant.

3d. The plaintiff has failed to show that the original indebtedness, or any part thereof, out of which the alleged usury, as stated in the declaration in said cause, arose, has been paid.

4th. It appears by the testimony that the amount of alleged bonus paid, together with all interest paid by the said plaintiff, does not amount to sufficient to pay the legal interest due the defendant in said cause.

5th. It does not appear in evidence in this cause that the principal and legal interest and any usurious interest has been paid by plaintiff to defendant on the contract and transaction out of which the alleged cause of action of plaintiff's in this case, is alleged to have accrued to plaintiff.

6th. Until the said plaintiff shall have paid the full indebtedness due by him to the defendant, to wit: the note and mortgage, in full with legal interest thereon as in said mortgage and note stipulated for, and something in addition thereto by way of interest, bonus, or otherwise, there could be no usury, and there is no proof in this case that any such payment ever has been made, and in fact the plaintiff admits that, of an indebtedness accrued at the date of the commencement of this suit, amounting to $65,000, with legal interest at 12 per cent. per year, the only payment made was less than $10,000, including the alleged bonus of $6,500 paid by plaintiff.

7th. It appears by the testimony of the plaintiff that he has assigned and disposed of all his right, title and interest in the subject-matter of this suit.

98 8th. It appears by the admission of the plaintiff in this case under oath that this said suit is not prosecuted in the name of the real party in interest therein, as required by the laws of this Territory.

9th. The plaintiff has failed to show that the defendant company has received any part of the alleged bonus charged in the declaration, to have been paid by plaintiff to defendant.

10th. The plaintiff has failed to show that the defendant company has received or was to receive any part of the alleged bonus charged in the declaration, to have been paid by the plaintiff to the defendant.

11th. The plaintiff has failed to show that the defendant com-

pany authorized George J. Dinkel to receive any bonus, or that the company had any knowledge at the time of the alleged transaction, that George J. Dinkel had received such money as agent for the company.

12th. The evidence shows that if any bonus was paid it was paid without authority of defendant, in violation of the laws of the Territory of New Mexico, and to an agent of the defendant, and the agent alone is liable.

13th. To establish usury, the fact of usury and the proof thereof must be clear and conclusive, and not mere conjecture or presumptive evidence, whereas such proof as is offered by the plaintiff in this case is conjectural and uncertain and not such proof as in such cases should be submitted to a jury.

14th. Because the note in this case is on its face legal, and the proof in such cases must show a corrupt agreement intentionally made for usury, which the proof offered in this case does not show.

15th. The agent Dinkel had the right to receive from McBroom, whatever his services to McBroom were reasonably worth, and there is no evidence that his services were not worth the sum of $6,500.

16th. It appears by the evidence that Dinkel, the agent of the defendant, was a special agent as to amount, and had no au-
99 thority to loan over the sum of $30,000, to any one person, and it nowhere appears in the evidence that the loan of $65,000 to plaintiff at a usurious rate by way of interest, bonus or otherwise, was authorized by defendant.

17th. There is a variance between the declaration and the evidence as to the time of the payment of the bonus.

18th. There is a variance between the declaration and the evidence as to the date of the note, and as to the time of the transaction.

19th. There is a variance between the declaration and the evidence as to the amounts claimed to have been paid in excess of the legal interest.

JOHNSON, VINCENT & JONES,
EUGENE A. FISKE,
Attorneys for Defendant.

Motion overruled by the court.
Exception reserved by defendant's counsel.

DEFENDANT'S CASE.

Testimony of David Simpson Carson.

Direct examination by Mr. A. A. JONES:

1. Please state your name to the jury.
A. David Simpson Carson.
2. Where do you reside, Mr. Carson?
A. Glasgow, Scotland.
3. Have you ever had any business connection with The Scottish

Mortgage and Land Investment Company of New Mexico, the defendant in this case?

A. I have.

4. Have you ever been officially connected with that company?

A. I was.

5. In what capacity?

A. I was senior partner of the firm who were managers of the company.

100 6. During what period of time was your firm the managers of the company?

A. From the foundation of the company in 1882 until July of last year, 1890.

7. Do you know, Mr. Carson, what transactions Mr. McBroom has had with the company, in reference to a loan of money—of $65,000?

A. Yes, sir, I am aware of the transaction.

8. State whether or not all of the correspondence between the home office of the company, and Mr. Dinkel, in reference to that loan, was carried on under your supervision?

A. It was. I would explain, possibly my partner may have signed some of the letters, some of the correspondence.

9. State whether or not you knew the contents of all official correspondence between the home office of the company and Mr. Dinkel, the resident agent of the company, with reference to this loan.

A. Yes, sir.

10. State whether or not your firm was the only firm, or individual or individuals who had any authority to communicate any information in reference to this loan.

Objected to by plaintiff's counsel on the ground that the authority of the officers of the company should be proved by the records of the company.

Objection sustained by the court.

Exception reserved by defendant's counsel.

11. State who kept the official books of the company.

A. The books of the company, so far as Scotland was concerned, were kept by my firm.

12. And were they kept under your direction and supervision?

A. They were.

101 13. Now give a complete history of this entire transaction so far as the home office and board of directors is concerned.

A. Do you want me to go into dates? I cannot recollect the dates of the different letters.

14. State, Mr. Carson, whether or not, some time during the month of February, 1886, you received a communication from Mr. Dinkel, in reference to this loan?

A. On the 20th of February, 1886, we received from Mr. Dinkel, a letter dated 5th of February, 1886.

15. Have you that letter?

A. I have that letter here. That letter enclosed a letter from Mr. McBroom, which I also have.

16. Are these the letters?
A. Yes, sir.
17. In whose handwriting is that letter?
A. That is Mr. Dinkel's handwriting.
18. Is that his signature at the end of the letter?
A. It is.

(Mr. JONES:) We offer these two letters in evidence.

The letters were here marked Exhibits P and Q, and were read to the court and jury as follows:

The Scottish Mortgage and Land Investment Company of New Mexico, Limited, Geo. J. Dinkel, manager.

Geo. J. Dinkel & Co., brokers and financial agents, First National Bank building.

LAS VEGAS, N. M., *Feb'y 5th*, 1886.

Messrs. Carson & Watson, general managers, 150 St. Vincent St., Glasgow, Scotland.

DEAR SIRS: I enclose a paper from the pen of Mr. W. H. McBroom, one of our largest ranchmen, descriptive of his property, and making an application for a loan of $65,000, or a proposition for a sale of his property in whole or in part. Mr. McBroom owes about $50,000 to various parties, and he wishes to consolidate
102 them into one sum and make a loan for the full sum and give his entire ranch and cattle and horses as security, including his residence in Santa Fé, which cost him about $6,200.

If, upon investigation his titles are found good, I would recommend it as a good loan, one of the best that could be made, at ten per cent. interest per annum, though I informed him that our company would not, I was quite sure, care to go to such a large sum in one loan, but I thought it possible that some individual could be found who would be willing to make the loan at ten per cent. interest per annum. Mr. McBroom has made also a proposition to sell on what I consider favorable terms, but he would only sell as a last resort, preferring to borrow the money. I forwarded a map of the property in December last to Dr. Percival, at Oxford, and I write him to send it up to you for inspection in connection with this proposition. There is no finer ranch in the Territory, than the one offered by Mr. McBroom, and his cattle are said to be far ahead of any in this country. I have never seen them myself, but have conversed with those who have, and all who know them speak in the highest terms of them. The live stock alone is worth about twice the sum for which he applies, at present prices, and there is no possibility of them being any less. The range is in a section of country that is never troubled with excessive cold, or even moderate cold weather, and as a consequence, losses rarely occur, only from natural causes, which can be largely provided against. I have laid this application before a board meeting at which were present Mr. Raynolds and Judge Vincent, and they recommend the same

to your consideration and favorable action. In order that time may be saved I will say that the property is now incumbered by a verbal bond until March 8th next, to some New York parties who are negotiating for it through one of our Congressmen, but it may result in nothing, and as Mr. McBroom is anxious to make
103 some kind of a turn soon, he wished me to lay this before you at once, and if you think you can place the loan please wire me the word "Yes," and if you do not think you can do anything with it please wire me the word "No," which I will understand.

Hoping for a favorable answer.

Yours, truly. GEORGE J. DINKEL, *Manager*.

(Mr. JONES to jury:) Now this letter here, which I will read, is the letter which Mr. Dinkel enclosed to the company when he wrote this other letter. This letter is on a letter-head of Mr. McBroom. It is addressed to Mr. Dinkel. It bears no date so far as I can see. (The letter is marked Exhibit Q.)

"DEAR SIR: I am owing some money and in consequence desire to either borrow or sell a portion of my ranch and cattle in order to enable me to pay up my debts.

"I own six thousand acres of land, water front along the Pecos river, and springs back from river on east side, a distance of eighteen to twenty-five miles. All tracts enclosed in red lines are owned by myself, and each and every tract has permanent water.

"My ranch and land is about one hundred miles south and a little east from Las Vegas, the nearest point to railroad eighty-five miles; a good wagon road all the way. When Atlantic & Pacific R. R. is built it will be about forty miles from my ranch to railroad. The grass in this section of the country is very good. My ranch lies between townships two and eight north of base line, and between ranges twenty-three to thirty east, and for description of grasses, etc., I refer you to field-notes of survey on file in surveyor general's office at Santa Fé. Our winters are very mild; cattle never suffer from severe weather as they sometimes do in Colorado, Kansas and Wyoming. This is now considered the best breeding section in the United States. My cattle and horses number
104 near four thousand head, and I believe it is generally admitted by all cattle-owners who know my cattle, that they are the best grade and quality of cattle in New Mexico. I have been selling my bull calves (all that are of good color), for fifty dollars each. I have placed among my cows since the summer of 1882, seventy thoroughbred short-horn bulls, bought from such breeders as H. M. Vail, Independence, Missouri; S. E. Ward & Son, Westport, Missouri; B. Powell, Lee Summit, Mo.; A. L. Hamilton, Lexington, Mo.; all breeders of the best strains of short horns in our country. I paid for these bulls prices ranging from $150 to $550 each. My beef steers were sold this fall (1885), about Nov. 6th, in Kansas City. There was in the yards that day above 12,000 head steers and beef cattle, and my steers brought the 'top' price over all this number. I mention this to show their quality. I now have

wire and fixtures on the ground for twenty-five miles of telephone line, and portion of poles for same. This is to connect my cow camps with home ranch, a great convenience and saving of horse flesh. There are four good ranch-houses which it would cost from $10,000 to $12,000 to build; also good corrals at convenient places on the range for corraling cattle. About twenty miles of fence; a young orchard of about 350 trees, assorted kinds, wagons, plows, mower, horse rake, blacksmith outfit, and many other small things which are indispensable and which cost a considerable. The land and water I own controls about 800,000 acres of grazing land, capable of grazing 50,000 head of cattle. I control all this because I own all the water.

"The following is a list of the property with value:

110 saddle horses, at $60 each	$6,600
70 thoroughbred bulls, at $100 each	7,000
3,298 head of cattle (extra quality), at $35 each	115,333
232 head of cattle (common), at $20 each	4,640
6,000 acres of land, at $15 per acre	90,000
Improvements, houses, fences, etc.	12,000
Wagons, harness, plows, mower, etc.	2,000
	$237,570

105 "The brood mares, colts and stallions, about 280 head, I have placed no price upon, because I prefer to keep them as I sell. 'Forty-one hundred acres of the land is patented; on the balance I hold warranty deed from persons of whom I bought, also 'final receipt' from Government and expect patent on all in few months.

"I wish to borrow sixty-five thousand ($65,000) dollars on five years' time, and will give a first mortgage on land and live stock. Or if your people prefer to buy I will sell out for $220,000, or one-half for $110,000 or a one-fourth interest for $55,000."

19. State whether any reply was made to that letter of Mr. Dinkel's?

A. A reply was sent on the second of March.

20. What book is that which you have?

A. This is the letter book of the company No. 2.

21. Is the original of the letter which you wrote to Mr. Dinkel, in the custody of your office? That is, the letter which you sent to Mr. Dinkel.

A. I cannot answer that question just now. I have a press copy of the letter here which I sent.

22. Do you know where the original is that was sent to Mr. Dinkel?

A. I have no doubt the letter is on record here with the other letters unless Mr. Dinkel removed it, as he did the letters introduced on the other side, without authority.

Counsel for plaintiff objects to answer of the witness.

Objection overruled by the court.

23. That letter before it was sent to Mr. Dinkel was copied in that letter book, was it not?

A. It was.

(Mr. JONES:) We offer in evidence the letter-press copy of the letter which was sent to Mr. Dinkel.

(WITNESS:) I also have the minute book of the company in which the decision of the directors is recorded.

106 24. On which page of the book is the letter recorded?

A. Page 858.

(Mr. JONES:) We offer in evidence page 858 of this letter book.

Page 858 was here introduced in evidence, and is as follows:

The Scottish Mortgage and Land Investment Company of New Mexico (Limited).

LAS VEGAS, NEW MEXICO, U. S. A., 2*nd March*, 1886.

George J. Dinkel, Esq., manager.

DEAR SIR: Your favor of the 5th, with the enclosure from McBroom, was before the board to-day; they decided as you anticipated, that the loan was too large for the company to make. We have offered it to one or two individuals without success, and do not anticipate that we shall be able to place it here.

The board did not consider the matter so pressing as to justify our being at the expense of cabling you. Should we find, however, that we can do anything within the next few days, we shall probably send you a cablegram. We are pressed for time to-day, so please excuse this short note.

Yours faithfully, CARSON & WATSON,
Managers.

25. State what book that is which you now hold in your hand.

A. This book is entitled Minute Book No. 1, of the Scottish Mortgage and Land Investment Company of New Mexico (Limited).

26. Is that one of your books which was kept by your firm as you have stated?

A. It was.

27. Now state whether or not, Mr. Carson, the board of
107 directors of this company, upon the receipt of the letter from Mr. Dinkel which has been read, had any meeting for the purpose of considering the contents of that letter.

A. They had a meeting. The first meeting on the first of March following the receipt of the letter.

28. Is the record of that meeting in that book?

A. It is.

29. On what page?

A. On pages 185 and 186 and 187.

(Mr. JONES:) We offer in evidence pages 185, 186, 187 of this book.

(Mr. JONES:) This book, gentlemen of the jury, as the witness has stated to you is the record of the transactions of the board of direct-

ors of this company, and contains a record of the transactions of this company at its home office in Glasgow, Scotland; on page 185 the following minutes are recorded:

Page 185 of the minute book referred to by witness is as follows:

"At a meeting of the directors held within the office of the company, 150 St. Vincent St., Glasgow, on Monday, 1st March, 1886, at 11 o'clock a. m." Then it states who was present, and states that some matters were considered by the board which have no reference to this transaction. It states there were present the chairman, Mr. B. Hall Blythe, Mr. William Ewing, Samuel Gunn, James Muirhead and Mr. D. S. Carson, for the managers, and at the bottom of that page gives the record with reference to this matter. I will read that just as it is.

"Mr. Dinkel's letter of the 5th February, with accompanying letter from Mr. McBroom, regarding loan of $65,000 was submitted, but the board considered the loan too large a one, and instructed the managers to inform Mr. Dinkel of their decision by letter instead of by cablegram, as requested by him."

108 30. State whether or not you received a letter from Mr. Dinkel, some time in the month of July, 1886, in reference to this matter?

A. On the 30th of July I find we received a letter from Mr. Dinkel, dated July 14th, 1886.

31. Have you that letter?

A. I have.

32. Is this the letter?

A. It is.

33. Is that Dinkel's signature to the letter?

A. It is.

(Mr. JONES:) We offer this letter in evidence. (The letter was here marked Exhibit R.)

(Mr. JONES to jury): This has the same kind of a heading, gentlemen of the jury, as the letter from Mr. Dinkel which was previously read to you. The principal part of the heading is: "George J. Dinkel and Company, brokers and financial agents, First National Bank building." I will read the letter.

EXHIBIT R.

"LAS VEGAS, NEW MEXICO, *July 14th*, 1886.

"Messrs. Carson & Watson, general managers, Glasgow, Scotland.

"DEAR SIRS: Some days since I wired you for $25,000, but have not yet received a reply, for which I am very sorry.

"I will explain why I asked for the money. W. H. McBroom, who made application for a loan of $65,000 some time ago, had made me a proposition by which I was to receive a commission of $6,000, if I secured a loan for him, of $65,000 at ten per cent., for six years, and I succeeded through Eastern parties, in raising the funds, with the help of a relative of Judge Vincent, but the parties who had

promised to put up the funds could not all do so, as they were themselves disappointed, and only $40,000 was put up, which of
109 course, would not do. Well, upon my return from the lower country a few days since, Mr. McBroom, who must have the money within the next two months, and despairing of procuring same from sources already tried, made me a proposition to the effect that he would give me a one-fourth undivided interest in his entire ranch and stock, if I would or could raise him the money. Such interest is to-day fully worth $50,000 *dollars*, and in five years would surely be worth $100,000. Now, such a proposition comes only once in a very great while, and I was anxious the company should have the benefit of this great commission, which would be in addition to the ten per cent. interest he proposed to pay. I finally concluded I would wire you for the money, and if you sent it I would make a deal that would, I felt sure, meet with the full approval of the directors, were they advised of the proposition. It is now I fear, too late to do anything, as he has made the same proposition to two others, and one of them will surely raise the money.

"Applications are again coming in and I hope to soon have most of the money in loans. I wired McBroom if he could use $10,000 or $15,000, and if he can, I will send it to him, as I have concluded you will not answer the cable I sent.

"Yours respectfully, GEO. J. DINKEL, *Manager*."

34. State whether or not shortly after the date of that letter any cablegram was received by your company.

A. My company received on the 26th of July, a cablegram from Mr. Dinkel.

35. Have you it here?

A. Yes, sir.

(Mr. JONES:) I offer it in evidence.

(The cablegram was here marked Exhibit S.)

36. Just read it to the jury.

110 A. The cablegram is addressed to "Thistle" Glasgow. "Thistle" was the registered address of the Scotch Company in Glasgow. The cablegram reads: "Wire answer my letter July 14th."

37. State whether or not upon receipt of that letter from Mr. Dinkel you did wire an answer.

A. On the 2d of August, after a meeting of the board, and according to the board's instructions, we wired or cabled Mr. Dinkel, as follows: I read from press copy of the cable message.

"Dinkel, Las Vegas, New Mexico.

"Willing loan McBroom flocking first mortgage lamprey declining fourth interest."

38. State whether that word flocking has any peculiar meaning.

A. The word flocking in the private code which we used with Mr. Dinkel, meant $25,000.

39. State whether that word "lamprey" was a code word?

A. Lamprey was a code word signifying "twelve per cent."

40. Then read your cablegram translating those words—just read it as though those figures were put in there.

A. "Willing loan McBroom $25,000 first mortgage at twelve per cent., declining fourth interest."

41. State for what purpose you used a code in your cabling?

A. The code was adopted to save the expense and partially for private reasons, so our business should not be known outside.

42. In what way did the company charge for those cablegrams? By the word?

A. Yes, sir.

43. Then your code used one word to represent a number of words in different instances, did it not?

A. It did.

111 44. Now what one-fourth interest was meant by that expression in that cablegram declining fourth interest?

A. It was understood by the directors that they were to become partners with McBroom to the extent of one-fourth.

45. And that is what they declined to take by that cablegram?

A. Yes, sir.

46. I will ask you whether, upon the receipt of that letter which has last been read as coming from Dinkel, dated July 14th, 1886, your company had any meeting to consider the contents of that letter?

A. It had on the 2nd of August, 1886.

47. Have you there the records of that meeting?

A. I have.

48. I will ask you to read the records of the meeting in reference to that particular letter.

A. Page 26, minute book of the Scottish Company: "Thereafter Mr. Dinkel's letter of July 14th, dealing with the proposed loan to McBroom, was considered. The meeting agreed to the following cablegram being sent to Mr. Dinkel, namely: Willing to loan McBroom $25,000 first mortgage, twelve per cent., declining fourth interest, and instructed the managers when writing Mr. Dinkel, to state that the board could not see its way to the company becoming *pari passu* bondholders with the lenders of the other $40,000, but that as cabled they were willing to loan $25,000 upon a first mortgage at twelve per cent., and relinquish any claim to the share of the one-fourth interest, by accepting which they feared the company might become partners with McBroom, in the opinion of the board an undesirable position to occupy. Dinkel to be asked his opinion as to the desirability of this company lending the entire $65,000, provided the loan was not already arranged, and the company had funds for the purpose."

112 49. State whether or not, according to the instructions of the board of directors, you wrote a letter to Mr. Dinkel in reference to that matter.

A. On August 3d and on August 5th, we wrote two letters, both referring to this McBroom matter.

50. Have you those letters?

A. I would explain here with reference to the letter of August 3d,, that it is not a press copy of the letter sent to Mr. Dinkel. The letter sent to Mr. Dinkel was copied by mistake of the clerk in one of our letter books, private letter books, but on the same day the mistake was discovered, and the clerk recopied the letter into this book.

(Mr. JONES:) We ask to introduce in evidence pages 57, 58, 59, 60, and 61, 62 and 63.

(The pages were here introduced in evidence, and are as follows:)

(Mr. JONES:) I will read these letters.

"3D AUGUST, 1886. (McBroom.)

"George J. Dinkel, Esq.

"DEAR SIR: Your letter of the 14th and wire of 25th July, were before our board at the meeting yesterday. By their instructions we cabled you yesterday, 'Willing loan McBroom flocking ($25,000) first mortgage lamprey (at twelve per cent.) declining fourth interest,' which we trust reached you in intelligible shape, and has enabled you to carry through the loan to him. The whole subject was very fully discussed by the board as well as the general question of accepting cattle as part of security for loans. The board could not see their way to lend the money *pari passu* with the other $40,000, by which we mean to rank along with the other $40,000, both as first bondholders, and they agree to relinquish any right to the one-fourth interest so that we might, if you can arrange it, be first bondholders with the $40,000 following as second. We have not time to write you at greater length to-day, but will do so by next mail, but we may say here that the board decided to
113 allow you to accept cattle as part security for loans up to $15,000, without consulting the board here, but loans above that to be referred to home board. Full details in next letter.

Yours faithfully, CARSON & WATSON."

5TH AUGUST, 1886.

George J. Dinkel, Esq., manager, Las Vegas, New Mexico, U. S. A.

DEAR SIR: In further reference to the question of loaning on cattle, referred to somewhat hastily in our last, and more particularly in the first place as regards the proposed loan to McBroom, we trust our letter was intelligible. The board were of the opinion it would not do for us to be joint bondholders, as it were, along with your other friends advancing the $40,000, not because they have a doubt as to the security being ample but for the reason that in the event of foreclosure, or other legal steps which might become necessary to take, we would not have the controlling voice, and might be seriously hampered in our efforts to realize on the security. Mr. Muirhead had experience of this kind in Canada. Again the board decided to relinquish any participation in the one-fourth interest on condition of being accepted first bondholders, and receiving twelve

per cent. interest, instead of ten per cent. interest. The board had the feeling that by becoming interested in the concern in that way, this company would be virtually unlimited partners with Mr. McBroom, and this is a species of venture they did not, with the information before them, feel justified in entering upon. It was expected that perhaps it might be possible to hold the interest as limited partners, and we were instructed to ask you, for the future guidance of the board, if they were correct in this supposition, and if so, to write us explaining the position of a limited partner under your
114 law, as regards his rights, duties and liabilities. Failing the carrying through of the loan as presently proposed, and assuming that we could, with perfect safety and prudence, accept the one-fourth interest and become thereby, limited partners, the board might be induced to accept the whole $65,000, if you and the local board are fully satisfied with the nature of the security and with McBroom as an individual. But please let us hear from you more fully on the subject. So far as we can see from the accounts, and assuming you have neither sent Mr. Browne money, nor invested any considerable amount, of which we have no advice, you would have sufficient funds to make this loan. As we indicated in our last, the board finally decided to sanction the loaning of money to cattlemen on the security of their ranches and cattle, at not less than twelve per cent., and agree that you might proceed to do this without reference to the home board, in all cases where the loan would not exceed $15,000, but any proposal over that amount to be first submitted to the board here. In granting this permission the board has desired us to state that they trust you will exercise the greatest caution as regards the class of men you loan to. In this description of loans the character of the borrower is of much more importance than in the case of the borrowers on real estate security only; and the board would suggest that you loan to men of known good character and standing, alone. The board likewise desire to lend only to men who own in fee simple, substantial portions of the ranches they occupy, so that we may have real estate security to some extent for our money.

Please note that we cannot always reply at once, to your wires. Members of the board must always be consulted, and this frequently takes some days to accomplish, more especially in summer time.

Yours truly, CARSON & WATSON.

115 51. State whether or not on or about the 10th of September you received a letter from Mr. Dinkel, dated July 29th, 1886?

A. In the middle of August we received such a letter from Mr. Dinkel, dated July 29th, 1886.

52. Have you that letter?

A. Yes, sir.

(Mr. JONES:) We will offer the letter in evidence.

(The letter was marked Exhibit T.)

(Mr. JONES:) Gentlemen of the jury, this letter has the same heading as the others, and reads as follows:

EXHIBIT T.

LAS VEGAS, NEW MEXICO, *July 29th*, 1886.

Messrs. Carson & Watson, general managers, Glasgow, Scotland.

DEAR SIRS: I am duly in receipt of your favor of July 10th. I wired you to answer my letter of July 14th, by wire, and I hope you will understand that I mean the portion of the letter referring to McBroom. I do not care to do anything more until I have your approval, though had I received the money promptly I would have taken advantage of the good thing, and I hope the directors will so consider it. We are now only paying twenty-five cents a word for cabling.

Yours truly, GEORGE J. DINKEL.

53. State whether or not on or about August 19th, you received any further communication from Mr. Dinkel?

A. On the 18th of September we received a letter dated 19th August, from Mr. Dinkel.

54. Have you that letter?

A. I have.

(Mr. JONES:) We offer the letter in evidence.

(The letter was here marked Exhibit U.)

116 (Mr. JONES:) This letter bears the same letter-head as the other Exhibit U: "George J. Dinkel & Co., brokers & financial agents, First National Bank building, Las Vegas, N. M., August 19th, 1886."

Messrs. Carson and Watson, general managers, Glasgow, Scotland.

DEAR SIRS: Your two letters of the 29th and 31st ult., to hand, the latter arriving this a. m. The disturbances in the vicinity of El Paso will, in my opinion, result in showing that the Mexican government was justified in the action taken by them, and that our Government will so decide when all facts are gathered. When a man, be he a citizen of the U. S. A. or any other country, goes to the Republic of Mexico, or any place else to live and do his business, he must, as a matter of course, conform his actions to the laws of the country he resides in, and if he sees fit to violate those laws he cannot expect the protection of the government under which he claims citizenship, but must be held to account under the laws governing his place of residence and where he does his business. This man Cutting, although a citizen of the United States, lived in Mexico, where he published a newspaper, and in doing so most flagrantly violated the laws of Mexico, and I think he will have to suffer the consequences, unless they through courtesy, declare void the action of their lower court, which may be done. Should this result in war, which is not at all probable, our securities in El Paso will, I think, be perfectly safe, as enough troops would be held there to make it all but impossible for the Mexicans to do any damage; more than that the town of El Paso would be the basis of our supplies.

(Mr. JONES:) I don't think it necessary to read the balance of this letter until we come down to the transaction.

I have had a rupture with Mr. Zollars, and would have had one with Mr. Roff had he not been removed from
117 the bank at Albuquerque, thus causing him to go away from Albuquerque, and on that account my relations with Mr. J. Reynolds and his brother, are very much strained, and I find it very unpleasant to be associated with him in business, and consequently desire to sever my connection with him. That it is to the interests of the company that such a separation is had I am fully satisfied, and I will undertake to satisfy you when I come over. I have been so badly treated by him that I concluded I would resign my position as vice-president of the First National bank and president of the City bank here, and change the account of the company to some other bank, and consequently drew the $25,000 last advised you through the First National Bank of Santa Fé. However, upon reflection, I concluded that I had better not do so for the present, nor until I had a personal interview with you, and got your consent for the change, and for these reasons I asked you not to answer my letter advising you of my intended visit to Glasgow, nor do I wish you to advise the receipt of this one, nor in any way refer to what I have said in these two letters in any that you may write me.

The money I drew through First National Bank of Santa Fé, I am returning to New York, and will continue as heretofore until I get your sanction for any change after I see you. * * *

In connection with my desired separation from Mr. Raynolds, I desire to have him relieved from my bond, and I desire to execute my own personal bond, giving to the company all my property in trust as a means of its becoming indemnified should I violate the trust placed in me, but this we can arrange when I see you.

August 30th:

As you will observe this letter has been written some 11 days. The great trial I have been called upon to bear, having caused me to overlook the finishing the letter for mailing until now. I
118 will make no change but some additions. I have word from Mr. Kent, of Albuquerque, through whom I insure, that he can probably rent a portion of the Webb property for $15.00, with some slight repairs, costing say $45.00 or $50.00.

* * * * * * *

I am much pained to inform you that the McBroom matter is "off," he having gone back on his solemn promises to me, and ignored all honor and manhood, and closed some kind of arrangements with our friend Mr. Raynolds. Mr. Raynolds knew full well that I had closed with McBroom, for he was told by several parties, McBroom having told him himself, and I told him substantially the same thing. It does seem that both the Raynolds are getting most selfish, and with them in any way connected with us, we will be tricked and imposed on in ways I cannot foretell. They knew

this was a big thing, and succeeded in beating the company out of it, and I cannot express in fitting terms my distrust of, and my disgust for them. And Mr. Blanchard feels the same way, as he was very anxious we should have the business. Mr. Vincent also tried to get me to go back on the company and let him make the loan through his friends, he having gone home and wired me he had raised the money. This I declined to do, and the next thing I knew of was that McBroom had gone back on us, and I would not be surprised when this matter is thoroughly sifted, that he will appear to have a part in the transaction with Mr. Raynolds. I do not want to do him any injustice, but I am forced to these conclusions by what I see and know. I am trying hard to put out this money left on my hands through the treachery of both McBroom and Raynolds, and will in a few days I hope, have another $9,000, and possibly one of $3,000 completed. I enclose a letter by Mr. Blanchard, which will explain itself. I do not wish to have Mr. Blanchard out of the company, but I do want Mr. Raynolds out, as in my opinion, the best interests of the company demand it.

119 As to changing the account of the company I would say that I would recommend the account to be kept in the First Nat. Bank of Santa Fé, or the San Miguel National Bank of Las Vegas. The former will not, in my opinion, pay interest on balances, but the San Miguel, in order to get our account, will pay us four per cent. per annum. Now you know how Mr. Raynolds refused all along to pay any interest until I finally told him that unless he did so, he would lose the company's account. He cares nothing for the company only as it can be used to further his own selfish ends, which I will not put up with. I did not wish to write you complainingly of him unless I was forced to, and this last McBroom matter I feel has forced me to make complaint. I will not, I am afraid, be able to get to Glasgow for some time, as I do not want to let this money lay idle. Should you write me on this subject, please mark the letter personal and oblige, so Mr. Loudon will not open it, should I be away. If you can send Mr. Ewing out here to make an investigation of this Raynolds and his mode of doing business, you would, I am sure, desire a change as much as I or Mr. Blanchard. He should com- " incog." but I must know if he is coming so I will not go to Glasgow. This is what we so much desired to have time to talk over with Mr. Mackenzie, when he was here.

I do not want any one but Mr. Blanchard and myself to know of Mr. Ewing's intended trip, should he come, so he can investigate for himself in his own way, what we may lay before him. I shall not start for Glasgow unless I know no one is coming over here. Should Mr. Ewing come please wire me the word " Chicago." If any one else comes wire me the word " school," and if you prefer I come to Glasgow, wire me the word " Savannah."

Yours truly, GEORGE J. DINKEL, *Manager.*

120 55. State what reply, if any, was made to that letter?

A. On the 23rd of August we sent a cablegram to Mr. Dinkel.

56. Read what you cabled him?

A. It is correcting the cable of the 2d of August. Cable 2d should read: "Willing lend McBroom apricot first mortgage lamprey decline 4th interest; sorry to learn wife's death."

57. State what that word apricot means.

A. I cannot tell what apricot means just now.

58. Did it mean $25,000?

A. (Referring to code book.) Apricot is $25,000. "Flocking," the word that was used before in the previous cablegram, also represented $25,000, but was part of a message "you may draw for $25,000."

59. Read this cablegram as it should be with the code words interpreted.

A. Cable 2d should read: Willing lend McBroom $25,000 first mortgage twelve per cent. decline one-fourth interest; sorry to learn wife's death.

60. State whether or not on or about the 24th August, 1886, you wrote Mr. Dinkel a letter.

A. Yes, sir.

61. Have you that letter?

A. I have a copy here.

62. What page?

A. Page 75.

(Mr. JONES:) I offer in evidence page 75 of this letter book, and also page 76.

The pages referred to were introduced in evidence, and are as follows:

"24TH AUGUST, 1886.

"George J. Dinkel, Esq., manager, Las Vegas, New Mexico, U. S. A.

"DEAR SIR: We are favored with your letters of 6th and 7th August, and cablegram of 23d August, about the matter.

121 We are exceedingly grieved to learn of your sad bereavement, which from the nature of the illness, we would infer was somewhat sudden; you have our deepest sympathy. We have to-day, dispatched to you four copies of the report of this year's general meeting, which we are sorry we omitted to be sent you before. We cabled you. 'Cable second should read, willing lend McBroom apricot first-mortgage lamprey; meaning twelve per cent., decline fourth interest; sorry to learn wife's death.' We are very sorry to have made the mistake in the code word, but trust our cablegram may have been in time to hinder completion of the loan. You will by this time, however, have received our letters of the 3d and 5th inst., explaining the ideas of the board as to the loan.

"Yours faithfully,

"CARSON & WATSON, *Managers.*"

63. State whether or not you received any cablegram from Mr. Dinkel, dated September, 1886.

A. We did.

64. Have you that cablegram?
A. I have.

(Mr. JONES:) We offer the cablegram in evidence.
Cablegram was here marked Exhibit V, and is as follows:

"Thistle"
"Glasgow,
"McBroom backed out. Be guarded what you say. I can use money."

65. What day was that cablegram received?
A. 4th September.
66. State whether or not you made any reply to that cablegram on the 7th?
A. Yes, sir, we wrote on the 7th of September to Mr. Dinkel.
67. Is that the letter-press copy of the letter?
A. Yes, sir.
122 68. On what page of the book?
A. Pages 87, 88 and 89.

(Mr. JONES:) We offer those pages in evidence.
The pages referred to were here introduced in evidence, and are as follows:

7TH SEPTEMBER, 1886.

George J. Dinkel, Esq., manager, Las Vegas, New Mexico, U. S. A.

DEAR SIR: We beg to acknowledge receipt of your cable of 4th inst. as follows: McBroom backed out. Be guarded what you say. I can use the money; and also your cable 7th inst. as follows: "Better have Brown lend apricot (meaning $25,000)." Your letter of the 12th inst. was before the board yesterday. Before deciding to sell the Sena property etc., * * *

We gather from your cablegrams above referred to that we are free to send Browne for investment, or otherwise to employ the $25,000 of money at present in the hands of Messrs. J. Kenneday and Company. We are sorry that the McBroom loan has apparently fallen through, and wait your details regarding same.

* * * * * * *

(Mr. JONES:) The remainder of the letter has nothing to do in regard to this transaction.

69. State whether or not on or about the 19th of September, you received a cablegram from Dinkel.
A. We did.
70. Have you that cablegram?
A. Yes, sir; I have.

(The cablegram was here produced and marked Exhibit W.)

71. At what time was that received by the company or by you?
A. 20th of September.
72. Just read that.

A. "Thistle, Glasgow:

123 "Will directors now loan McBroom arsenic apace first year laconic after that lamentable with quarter interest if board approves have aroma with Tod anoint here will need apace."

73. Just translate the words as you go along.

A. Will directors now loan McBroom $65,000 first year six per cent., after that ten per cent., with quarter interest? If board approves have $50,000 with Todd, $5,000 here; will need $10,000.

74. State whether you sent any cablegram in reply to that.

A. Yes, sir. On the 23d September we sent Mr. Dinkel the following message.

75. Just read it and interpret it while you give it to the jury.

A. "McBroom, the board sanction a loan of $30,000 first mortgage ten per cent., or $65,000 twelve per cent., decline quarter interest, but get best cash bonus possible instead, or get third party to buy quarter interest and pay us."

76. State whether you wrote a letter to Mr. Dinkel on the 23d of September.

A. Yes, sir.

77. Is that the letter that you have there or a copy of it?

A. It is.

78. On what page of the book?

A. Pages 108, 109, 110.

The pages referred to are as follows:

23D SEPTEMBER, 1886.

George J. Dinkel, Esq.

DEAR SIR: The board very carefully considered your cablegram of the 20th inst., at a meeting held to-day, and finally instructed us to transmit you the following cablegram, which we have done (then follows a copy of the cablegram which was just read).

124 The board did not see their way to accept the proposition you cabled. As we stated in our letter of the 7th August, the board, with the very limited information at hand regarding the working of the undivided interest principal, did not feel disposed to be mixed up in any way as a partner with McBroom, not knowing into what trouble and responsibilities it might lead; but it occurred to the board that you might in some way accept the quarter interest of McBroom, having previously arranged to dispose of it at once, to some one who would take it off our hands, freeing us of all responsibility, and paying us a handsome price, which we would treat as a bonus upon the loan, or else McBroom himself, would give a good bonus if we relinquish the quarter interest. We trust our cablegram has made this quite clear to you. We are very sorry you have had so much trouble in connection with this loan, but we trust you will find the terms of our cablegram workable. We shall write you regarding the other matters in your recent letters, at length in a day or two.

* * * * * * *

(Mr. JONES:) The balance of the letter has nothing to do with this transaction.

79. State whether or not on the 24th of September, 1886, you received a cable from Mr. Dinkel.

A. We did.

80. Is that the cablegram?

A. Yes, sir.

(Mr. JONES:) We offer it in evidence.

(The cablegram was here marked Exhibit W 1.)

81. Please read it.

A. "Thistle, Glasgow: McBroom arranged, send $15,000 to complete."

82. State whether or not on the 25th of September, you wrote a letter to Dinkel.

A. We did.

83. Is that the letter?

A. Yes, sir.

125 84. On what pages of the book?

A. On pages 111, 112, 113, 114, 115 and 116.

(Mr. JONES:) I will offer those pages in evidence.

(Mr. JONES to jury:) Gentlemen of the jury, most of this letter is in reference to other matters, and I will simply read that portion of it which relates to this transaction.

The papers referred to were introduced in evidence, and are as follows:

"Important matters connected with the negotiations in the matter of the McBroom loan about which you wrote on the 19th and 30th ultimo, and Mr. Blanchard on the —— ultimo, as also your remark in the matter of the $2.50 charged by the bank in Albuquerque, in a former letter, engaged the very anxious attention of the board for some time on Thursday. They have desired me to express their very high appreciation of your unwearied efforts to carry through the McBroom transaction, and their hearty sympathy with you in the difficulties you have encountered in a quarter where such was certainly quite unlooked for by the board here. The board believe that you and Mr. Blanchard will do nothing hastily, in the way of coming to an open rupture with the other party or parties, and would fain hope that the further investigation into all the circumstances, which you are no doubt both making, will reveal a state of matters not quite so acute as you at the time of writing us, believed to exist. The fact that you have cabled us a fresh proposal, leads us to entertain some such hope, and we await further communication from you. The board are inclined to think that at the present juncture the amount of good which would be served by either your coming to this country, or by one of their number visiting you, would hardly compensate the company for the considerable outlay of both time and money involved in such a trip. They are

most anxious to have the expenses as low as possible this
126 year, with a view of raising the market value of the shares, and feel perfectly confident that no great catastrophe can happen with you at the helm on the other side. They have desired us to ask you to be good enough to write them unreservedly of any further details of this particular transaction you may have discovered, and to enter very fully into the other matters concerning the principal hinted at in your letter of the —— ultimo. Upon receipt of this information the board will then reconsider the propriety of a meeting with yourself with one of their number, either here or on your side. They think you should not meanwhile, make any change of the bank account, but keep the majority of your funds in New York.

"Yours faithfully, CARSON & WATSON, *Managers.*"

P. S.—Since the above was written your favor of the 7th, and cablegram of this day, intimating the completion of the transaction with McBroom for $65,000 have come to hand. We are very pleased to be advised of this result, and trust that now matters may move smoothly.

CARSON & WATSON.

85. State whether or not you received a letter from Mr. Dinkel, dated October 6th, 1886?

A. We did.

86. Is that the letter?

A. It is.

(Mr. JONES:) I introduce this letter in evidence.

The letter was here marked Exhibit X, and is as follows:

The Scottish Mortgage and Land Investment Company of New Mexico, Limited. Geo. J. Dinkel, manager.

George J. Dinkel & Co., brokers and financial agents, 1st National Bank building.

LAS VEGAS, N. M., *Oct. 6th*, 1886.

Messrs. Carson and Watson, general managers, Glasgow, Scotland.

127 DEAR SIRS: I am duly in receipt of your favor of Sept. 7th.

* * * * * * *

"In the McBroom matter I will say that your cable was received as follows: 'McBroom damp apron first mortgage lamentable or arsenic apace lamprey decline fourth interest, but get best cash bonus possible instead, or get third party to buy fourth interest and pay us.' The word 'bonds' we could not fully understand. We at first thought it referred to the principal and interest notes, but that could hardly be. I have concluded it must mean bonus, wanting me to get as large cash bonus possible. Upon receipt of your wire 'Will wire you Thursday,' I made an appointment with McBroom for that day from one to two o'clock p. m., and he came

in to make a final proposition; failure to accept it on my part, would forever close the matter as far as he and I were concerned. He made me the proposition that was finally consummated, but which I then declined as I had not yet received your wire. Mr. McBroom left my office at about 2.30 when I went over to the west side to attend to some business, and passing the telegraph office about 3.30, I went in to see if anything had been received, and they had just taken your wire from the instrument. I waited and took it with me and found it sanctioned just such a loan as McBroom had proposed, which I had positively declined, thus making it all but impossible for me to introduce the matter to him with any hopes of its being accepted, and in this embarrassed condition I sought the aid of Mr. Vincent, as Mr. Blanchard and Raynolds were away. Had the wire came to hand an hour sooner I could have made a clear $8,500 commission, $6,500 of which was to be cash and the $2,000 in two notes of $1,000 each, at six per cent., running 18 and 36 months, interest payable half yearly. I proposed to Mr. Vincent that if he could now induce McBroom to again make
128 the same proposition he would see that it would be carried out, and I would give him half that would be made by it, and after a long discussion McBroom made the proposition in writing, and it was at once closed up. The cash commission was $6,500, and Mr. Vincent charged him $400, total $6,900, one-half of which was to be and is now Vincent's, and the balance I have. Mr. Vincent says that if the company took any portion of this commission it would be liable to the borrower for double the sum, which he could, and under the present circumstances no doubt would, recover the same from the company, by a suit in the district court, as that is the penalty provided for by the usury law last enacted, and it would therefore be very risky for the company to accept any of it. I have made up my mind, however, that the company should have the commission, or that part I control, and in order to consummate it I propose to give my note to the company for the $3,450 for three years without interest (as I should be entitled to at least the use of the money free for that time), at which time I can find some way to pay the same to the company without any one noticing it, so the risk would be reduced to a minimum. I have only spoken of this to Mr. Blanchard, and he, I am glad to say, approves of the same, although he would like to have had me make the commission myself, as I have been working with him (McBroom) now for three years, and this is the only time I have been in position to be paid for what I had done for him. However, I will waive any interest I may have in this commission, and pay it to the company at the end of three years, upon condition that my agreement with the company for the year 1886 be continued for other three years, taking in the years 1887, 1888 and 1889. I make the note for three years, as the usury law provides that to recover under it, suit must be brought within three years from the time the cause for the action accrued. The cause for the action accrued Sept. 25th,
129 1886, the day the loan was completed, and after three years I could pay it to the company, as the statute of limitation

would bar action after that. Should action be had before the expiration of the three years I could then have you return me the note and I would destroy it, when the matter would stand as at present, and then again, when the action would be terminated I could renew my note, which could be continued until the end of the three years. It would not be wise for any one outside of the directors to know of this, so that it could be consummated without any hitch from any source. Kindly advise me as promptly as possible what action is to be taken on this by the directors.

"The persons above all others who I do not think it safe to know this are Mr. Raynolds and Mr. Vincent.

* * * * * * *

"Yours truly, GEO. J. DINKEL, *Manager*."

87. State what action of the board of directors if any, was had upon the receipt of that letter from Mr. Dinkel?

A. At the first meeting of the board held after the receipt of the letter from Mr. Dinkel, the meeting was on the 8th of November, 1886.

88. What page of the book is that record on?

A. Page 218.

(Mr. JONES:) I will ask to introduce in evidence page 218 of that book.

(Mr. SPRINGER:) I desire to state that this proposed resolution or opinion of the board seeks to show some subsequent action of the board in regard to this money; also to show that they were not aware of the fact that the taking of the money was a violation of the law, etc. I submit neither one of these things would avail as a defense here. I mention it now in order that I may reserve the right to have it covered by proper instructions of the court.
130 I desire to say that I consider it an insufficient defense, and will ask the court to cover it by an instruction.

(Mr. JONES:) Gentlemen of the jury, on page 218 of this book, under the date of a meeting 8th November, 1886, at 11.30 a. m., I find the following in reference to this matter.

Page 218 of Minute Book.

"The board carefully considered the matter referred to in Mr. Dinkel's letter of 6th October, and instructed Mr. Carson to write Mr. Dinkel to the effect that when the cablegram authorizing the loan to McBroom was sent, the board had no idea that their proposal, if carried out, would be any infringement of the usury law. That the board did not see their way to accept Mr. Dinkel's proposal as to the disposal of the one-half of the bonus over which he had control, and that the board were disposed to think Mr. Vincent's services in the matter of the negotiation should have been freely granted Mr. Dinkel without extra remuneration."

89. State whether or not, Mr. Carson, in accordance with the instructions of the board you wrote to Mr. Dinkel?

A. I did.

90. Have you that letter?
A. I have a copy here.
91. On what pages of the book?
A. Pages 191, 192, 193 and 194.

The pages were here introduced in evidence, and are as follows:

12TH NOVEMBER, 1886.

"George J. Dinkel, Esq., manager, Las Vegas, New Mexico, U. S. A.

(McBroom loan.)

"DEAR SIR: The portion of your letter to us of the 6th ultimo, dealing with this matter, was the subject of very long and careful consideration by the board, at their meeting on Monday last.
131 As you would no doubt surmise, when considering the terms upon which the board cabled they were willing to make the loan, the board had not before them the usury statutes, and were entirely ignorant that the proposal they made, if carried out, would have been struck at by the statutes, but they have since had its provisions under consideration, and are of the opinion that the acceptance by the company of the cash bonus as such, would have been illegal, and under these circumstances they do not feel that they could avail themselves of the proposition you have made. Desiring as they do to keep strictly within the limits of the law, the board heartily recognizes the honorable and open manner in which you have communicated the details of this transaction to them, and your desire to give the company the benefit of the proportion of the bonus directly under your control, but the board are not altogether satisfied that Mr. Vincent was justified in accepting the share of the bonus which you offered him. In the opinion of the board the services you asked him to render should have been given freely and without the thought of any remuneration. He is one of the advisory board, and as the company's attorney he is paid for services such as these, and would benefit besides by the transaction to the extent of the fee he would receive, as law agent for the borrower. Mr. Vincent advised you the company could not receive the bonus. This is no doubt, the case, but it seems to the board that in his capacity of advisor he should should have recommended that the money be retained in trust as a further security for the due fulfillment of McBroom's obligations. In this way the company would have been benefitted, and the transaction would have been more nearly on the lines contemplated by the board in its cablegrams. In conclusion the board desire us to express generally as a matter of principle, its disapproval of the officials of the company, or its advisory board profiting in any shape through the
132 transactions of the company, other than in the ordinary way, or by exceptional remuneration specially sanctioned by the home board. This, we feel sure, you will at once recognize as essential to the success of the company, and a security to the shareholders. Should you think it advisable to communicate the contents of this to Mr. Vincent, you are of course, at liberty to do so,

but the board leaves the matter entirely in your hands. As regards loan No. 106 recently advised, what precautions have you taken to ascertain that the number of cattle said to be on the range, are actually there?

92. Was this loan No. 106 this McBroom loan?

A. I cannot say from memory.

93. State whether or not on the 20th of November, you wrote another letter to Mr. Dinkle.

A. We did.

94. Have you a letter-press copy of that?

A. I have, on page 208.

(Mr. JONES:) We offer that letter in evidence.

Page 208 was here offered in evidence and is as follows:

20TH NOVEMBER, 1886.

George J. Dinkel, Esq., Las Vegas, New Mexico.

DEAR SIR: Since we wrote you last our solicitor, Mr. Muirhead, was not present at the last meeting of the directors, has been carefully studying and considering the usury law, with the result that he has considerable doubt as to whether you yourself, or Mr. Vincent are not so intimately connected with the company in your official capacity as manager and law agent respectively, and as *ex officio* members of the advisory board, as to bring you under the class of persons who may not receive any bonus from a borrower, and under these circumstances the board, at a meeting to-day, again had the matter before them, and have come to the conclusion that the matter cannot be left in its present unsatisfactory state. They consider
133 that the $6,500 received, should be paid to the company as a payment on account of the first year's interest due by McBroom, and that McBroom should be notified that this has been done, and a proper receipt given him for it, so that the company, yourself, and Mr. Vincent, can be placed in clear and legal position. We are instructed to request you to telegraph as soon as possible after the receipt of this letter, that the repayment to the company has been made, and the matter put upon a proper legal basis. After this has been done be so good as to have a written opinion from Mr. Vincent to the company, that all is now in order, and that no further claim can arise against the company in connection with the business. In this connection, and referring to your letter of 19th, 30th August, and 7th September, the board are sorry you should have thought it necessary to keep Mr. Loudon in ignorance of the details of the transaction. He is a trusted servant of the company, and the board feel certain he will not betray the confidence they have placed in him. Should any unavoidable accident befall you, which the board sincerely pray may never happen, the management would, for a time at least, devolve upon Mr. Loudon, and it would be exceedingly awkward were he to be in ignorance of the history or details of some of the most important of the company's transactions. The board would like Mr. Loudon to see all the let-

ters from this side not privately addressed to you, and they think that all of your letters on company business, excepting of course, such as may deal with your own private arrangements with the company, should be kept in the company's letter books.

We are favored with yours of the 3d inst., with enclosures noted therein. As the board contemplates having securities examined in Las Vegas this year, in preference to sending them here, which is a risky business, kindly retain them, pending further advice.

Yours truly, CARSON & WATSON, *Managers.*

134 95. Did you receive from Mr. Dinkel a letter dated December 21st, 1886?

A. We did.

96. Is that the letter?

A. It is.

97. Signed by Mr. Dinkel?

A. Yes, sir.

(Mr. JONES:) We offer the letter in evidence.

(The letter was here marked Exhibit Y.)

EXHIBIT Y.

George J. Dinkel & Company, brokers and financial agents.

LAS VEGAS, *Dec. 21st*, 1886.

Messrs. Carson & Watson, general managers, Glasgow, Scotland.

DEAR SIRS: Your letter of November 20th, 1886 —. I wired you to-day "McBroom, see letter," which I now beg to confirm.

I enclose a letter from Mr. Vincent in answer to one I wrote him, notifying him of the wish of the directors, which will, I hope, explain itself much better than I could. My desire has always been to further the interests of the company, and if I appear to have erred, it is from a mistaken judgment, and not from a desire to show my authority. I wish now, to say that (to show my good faith, and to avoid even a possibility of the company getting into trouble on account of anything I may have done, which Mr. Vincent says positively, cannot happen), I have arranged with McBroom for a loan covering the amount he paid me of the bonus. I have signed a note with him for the amount, payable 12 months from date, and Mr. Raynolds has given him the money on the note, and I have arranged and agreed to pay the note myself, at maturity, provided of course, that McBroom permits me to.

135 With the letter of Mr. Vincent as a guide, the directors appear to have been unnecessarily exercised about this matter, but that does not lessen my regrets for having been the innocent cause of so much anxiety on behalf of the directors, and they can rest assured that this matter will cause me to use much greater care in matters of this kind.

* * * * * * * *

Yours very truly, GEORGE J. DINKEL, *Manager.*

98. Did that letter contain an enclosure from Judge Vincent?
A. Yes, sir, it did.
99. Is this it?
A. Yes sir, it is.

(Mr. FISKE:) This letter was an enclosure in the letter which has just been read, dated Las Vegas, New Mexico, Dec. 14th, 1886. We offer the same in evidence.

The letter was here marked Exhibit Z, and is as follows:

Breeden & Vincent, attorneys and counselors at law, 1st National Bank block.

LAS VEGAS, NEW MEXICO, *Dec. 14th*, 1886.

George J. Dinkel, Esq., Las Vegas.

DEAR SIR: Yours of the 13th inst., has been received. The suggestion that I should return to the company, as a payment upon McBroom's interest for the first year, the money I received from you for inducing McBroom to borrow the money from the company, is a great surprise to me. You know very well that when you came to me and offered me one-half the bonus if I would persuade McBroom to take the money from the Scotch company,
136 that he had fully resolved to take the money from other parties, who had offered it to him upon more advantageous terms, and seemed determined that the Scotch company should not have the benefit of the loan. You also know that I spent some money, practically all my time for more than a week, and neglected my practice, in my efforts in behalf of the company, and that in consideration of his taking the money from the company, agreed to make the examination of title and prepare the papers, at a mere nominal price, which I may add, has never been received. You must believe as they would, at the home office, if familiar with all the facts, that in view of the peculiar and particular circumstances surrounding the case, that I fairly earned all I received, as you did all you received. The transaction was legitimate and in good faith; the company has lost nothing, and will not, by the matter, and it seems to me that the directors go entirely out or their province when they ask either one of us to pay the money into the company to the credit of McBroom. In effect it is a present to McBroom, of so much money, and I do not feel disposed or able to make presents to McBroom. The company is to receive all that it is lawfully entitled to receive, and in the end would not have one penny more on account of our giving up what we have fairly earned, while we would be just so much poorer and McBroom just so much richer.

There is nothing in the suggestion of Mr. Muirhead that the company has been guilty of usury in the matter, because of our official relation to the company, and I am willing at any time, to give the company a certificate to that effect. You will recollect that at the time the loan was made, we discussed the matter, and I called your attention to a case reported in 113 Illinois, which is conclusive upon the subject. If that bonus had been received by us as officers of

the company, for the benefit of the company, it would have been usury, or in other words, if it had been paid to us as a mere
137 subterfuge, and had been by us paid to the company, it would have been usury, or if the company made a custom of remunerating you for your services, by compelling you to charge a bonus on all loans, and that was your sole compensation, so that the company in that way only obtained your services by compelling the borrower to pay you, that would be usury. As it is the company is free and clear from all taint of usury in the McBroom transaction, and I decline to make McBroom a present of money I labored so hard to earn.

Yours truly, WM. A. VINCENT.

100. On the 11th day of January, 1887, did you address a letter to Dinkel in relation to this matter?

A. We did.

101. Have you that letter?

A. I have.

102. Is that it?

A. Yes, sir.

(Mr. FISKE:) We offer in evidence page 277 of the Letter Book No. 3. This letter is addressed to George J. Dinkel, Esq., Las Vegas, New Mexico. The first two pages and nearly all of the third page do not relate to this transaction, and I will therefore not read them. The part that refers to this transaction is as follows:

"11TH JANUARY, 1887.

"George J. Dinkel, Esq., Las Vegas, New Mexico, U. S. A (McBroom loan):

DEAR SIR:

* * * * * * *

"The board had Mr. Vincent's letter under their anxious consideration. Looking to the whole circumstances of the case the board are inclined to waive the request in our letter of 20th November, that Mr. Vincent should repay the sum he received from McBroom, but they must ask you to obtain from Mr. Vincent, the cer-
138 tificate he intimates on page three of his letter, he is willing to give as to the safety of the company's position, and also a guarantee from him, to relieve the company of any loss it may sustain, should McBroom ultimately refuse to implement his bargain on the plea of usury. He can have no hesitancy in acceding to this request, looking to the very decided opinion he appears to hold regarding the company's position.

* * * * * * *

"Yours truly, CARSON & WATSON, *Managers.*"

103. Did you write a letter to Dinkel on the 6th of April, 1887?

A. Yes, sir.

104. Is that the letter?

A. It is.

(Mr. FISKE:) This letter is on page 415, Letter Book. 3. We offer the letter in evidence.

APRIL 6TH, 1887.

George J. Dinkel, Esq., manager, Las Vegas, New Mexico.

DEAR SIR: We have your letters of 7th, 10th, 12th and 15th ultimo, to reply to. We have also received from you Mr. Vincent's letter of guarantee to you, dated 14th February, 1887, *re* the McBroom matter, which the board accept as sufficient. * * *

Yours faithfully, CARSON & WATSON, *Managers.*

105. State in what capacity Mr. Dinkel was acting for this company during the time of this correspondence?

A. He was general manager in New Mexico.

106. What were his powers as general manager?

Objected to by plaintiff's counsel on the ground that the by-laws and other written evidence of the company's record, would show what his duties are.

139 107. (Mr. FISKE to witness:) Were the powers and duties of the general manager of the company for New Mexico, defined in the constitution and by-laws of the company of which you are the Scottish manager?

A. They are not.

108. What were his powers and duties as general manager?

A. His powers and duties as general manager were to arrange for the lending of money in New Mexico, and he was authorized in connection with the advisory board, with the approval of the advisory board in Las Vegas, to make loans up to a certain amount, I think it was $15,000, without consulting the home board.

109. Then he had no power to make loans, even up to $15,000, without consulting the local advisory board?

A. No, sir, he should always take the advisory board in with him in all matters.

110. State whether or not the company, at the time of this transaction, had a local attorney employed.

A. The company retained Mr. Vincent as local legal advisor.

111. State what the duties of Mr. Vincent were as local legal advisor.

A. The duties of Mr. Vincent were to examine the titles for business that was passed upon and approved of by the local advisory board or the home board, and to advise Mr. Dinkel in all legal matters, and keep the company right here; to keep all the transactions perfectly legal and clear. The parties at home could not know the local law here, and they relied upon the legal advisors here to keep them within its limits.

112. Were Mr. Dinkel's actions in these transactions for the company, subject to the approval of Mr. Vincent, as solicitor of the company?

A. They were.

140 113. State whether or not Mr. Dinkel had any authority from the home board to do any act or thing for the company,

after he should have been advised by the local attorney that it was illegal.

Objected to by Mr. Springer, counsel for plaintiff.

(Mr. JONES:) We desire to introduce this testimony for the purpose of showing that Mr. Dinkel had no authority, as agent of the company, to make any loan which he had been advised by the solicitor for the company, was illegal, and we expect to show that after Mr. Dinkel received authority from the company to accept a cash bonus, that he submitted the matter to the local attorney, and the local attorney told Mr. Dinkel that to carry out the transaction would be illegal, and thereupon Mr. Dinkel refused to carry out the transaction, and the transaction which was authorized by the board was not carried out, and that Mr. Dinkel had no authority from the board to carry out the transaction which was finally consummated. We desire to introduce this evidence also for the purpose of showing that this cablegram, when it was sent to Dinkel, was burdened with the proviso that the local attorney should say that the transaction was legal, and according to the laws of New Mexico, that was the proviso that followed that telegram; that this cablegram, by the authority which had formerly been vested in this agent, was burdened with the proviso that it should be approved by the local solicitor, and in carrying out the transaction it should not be contrary to the laws of New Mexico; and whenever the agent did anything contrary to the laws of New Mexico, that then there was no authority behind it to bind this company.

Objection sustained by the court.

Exception reserved by defendant's counsel.

114. State, Mr. Carson, whether or not all business to be carried out by Mr. Dinkel, was to be done by the approval of the local solicitor for the company, so far as the legal rights of the company were concerned.

141 A. Yes, sir, that was the object of our having a solicitor retained here, to keep us right in legal matters.

115. State whether or not, in any transaction which your home office should instruct Mr. Dinkel to carry out, whether he would be authorized to carry out these transactions if the local solicitor should disapprove of them as being illegal?

Objected to by plaintiff's counsel on the ground that the question calls for a conclusion of law as to what his authority would be.

Objection overruled.

Exception reserved by plaintiff's counsel.

A. No, sir, certainly not.

116. During the year 1886 what salary did Mr. Dinkel receive as agent for the company?

A. I believe $5,000, but I would not swear to that.

117. According to your best recollection that was the amount, was it?

A. Yes, sir, it was.

118. State whether or not that salary of $5,000 was a modification of the previous contract with Dinkel?

A. No, sir, if it was $5,000, that was what he started in originally.

119. But there were commissions and one thing and another, attached to the first $5,000, making it somewhat contingent, was there not?

A. The original contract will show.

120. The $5,000 in 1886 was to be paid in cash?

A. Yes, sir.

121. Without reference to commissions or anything else?

A. Yes, sir, regular salary.

122. Then different arrangements had been made between the company and Dinkel from that which formerly existed between the company and Dinkel and Browning?

A. I don't quite understand.

142 123. After the death of Browning you made a special arrangement with Dinkel?

A. We did. That was the first agreement we made.

124. After the death of Browning?

A. Yes, sir.

125. During the year 1886 Dinkel alone was the resident agent of the company?

A. He was.

126. State whether or not the defendant in this case has ever received any part of the bonus for making this McBroom loan?

Objected to by plaintiff's counsel as immaterial.

Objection overruled.

A. The company, the defendants, have never received a single penny of any bonus.

Cross-examination by FRANK SPRINGER:

1. In the minutes of the meeting of the directors, held about the 23d of September, 1886, referred to by you in your letter to Dinkel of that date, who appears to have been the chairman of the meeting?

A. Mr. Gunn.

2. Was he permanent chairman of the board during these times?

A. He was not. When Mr. MacKensie, permanent chairman, was absent, the meeting elected whoever they desired, as chairman.

3. Who was the president of the company and permanent chairman of the board during the year 1886?

A. Mr. MacKensie.

4. What was his full name?

A. Colin J. MacKensie.

Testimony of William A. Vincent.

Direct examination by A. A. JONES, Esq.:

1. Is your name William A. Vincent?

143 A. Yes, sir.

2. Where did you reside in the year 1886?

A. Las Vegas, New Mexico.

3. In what business were you engaged in at that time?

A. Practice of the law.

4. Did you have any connection with The Scottish Mortgage Company, the defendant in this case?

A. I was local solicitor of the company.

5. State whether you know anything about the making of the loan for $65,000 to William H. McBroom, the plaintiff in this case.

A. I do.

6. State the whole transaction as you recollect it.

A. Mr. McBroom came to me in the latter part of that year, I cannot remember the exact month, and told me he wanted to borrow $65,000. He told me if I could secure the loan for him, he would pay me a bonus of $6,500 for doing it. I told him from what I knew of his property I thought I could obtain the money for it, and that I would undertake to secure the money for the bonus of $6,500, to be paid to me for my services in procuring this money for him. He told me he had been talking to Mr. Dinkel in regard to obtaining money from the Scotch company, but he had no expectation in view of what Dinkel had said, of obtaining the money from them. Shortly after that my father-in-law, Mr. Charles Ridgeley, who resides at Springfield, Illinois, came here, and I made an effort to have him loan the money to McBroom personally. He was satisfied with the security, and said if he could arrange his matters he would advance the money to McBroom on the security of his cattle and ranch. He afterwards advised me that he could not do it, but said he would assist me in obtaining the money from some other people. I left here and went from here to Springfield. I talked to Mr. Ridgeley in Springfield. Mr. Ridgeley and I went to
144 Chicago and saw a man there, whose name was Crawford, I think, his office was in the First National bank there. Crawford promised he would loan the money if things turned out as they were represented. Crawford failed to furnish the money, although I wired Dinkel I had the money secured. Afterwards I interested a man named Brinkerhoff, of Springfield, Illinois, who tried to make arrangements to get the money through some company in Kansas City, I have forgotten the name of it, and they promised to loan the money, but it never materialized. I knew that McBroom and Dinkel were figuring on this loan. Dinkel always told me that he was to get a commission from McBroom, if he could induce the Scotch company to loan him the money. He told me at one time that McBroom had agreed to give him a fourth interest in the property, if he succeeded in inducing the Scotch company to advance the money. Some time after that McBroom came to see me, and I saw him frequently at this time, and he said he thought Dinkel was too exhorbitant in his demands, and insisted on having a fourth interest in the ranch for obtaining this money for him. He said he had been talking with Sulzbacher, and Sulzbacher advised him that that was too much to pay. He asked me if I did not think it was too much for him to pay, I told him I cer-

tainly did. He told me he was willing to pay Dinkel anywhere from $6,000, $7,000 or $8,000, but he was not willing to pay any more, and asked me if I did not think that was enough for him to pay Dinkel, I told him I thought that was plenty.

I expect I might say here, although I will give Mr. Springer an opportunity to object, it may not be proper testimony, that I had been in Scotland in the year 1885, and had attended a number of meetings of the directors of the Scotch company. That I knew from what had been said to me by the directors in the directors' meetings, that the company never intended, under any cir-
145 cumstances, to loan more than $30,000 to any one individual, or any one corporation. I also knew that Mr. Dinkel had no authority to loan to exceed $15,000, except by the express authority of the directors at the home office in Glasgow. Mr. McBroom never said to me, that I recollect of, that this one-fourth demanded by Dinkel, or any other amounts that had been discussed, were to be paid exclusively to Dinkel or to the Scotch company. In all my conversations with Mr. Dinkel, the money was spoken of, the bonus, as being for him; in all my conversations with McBroom, we spoke of the commission as going to Dinkel. I never said to McBroom that I understood this commission was to go exclusively to Dinkel, and he never said to me that he understood it was to go exclusively to Dinkel, or partly to Dinkel and partly to the Scotch company. But we always spoke of the bonus to Dinkel.

7. That is, in the event that he secured the loan?

A. Yes, sir.

8. To whom was the bonus to go in case you made the loan?

A. In case I secured the loan the bonus was to go to me personally.

9. Let me ask you right here, if being agent for the Scotch company was the only occupation or business of Mr. Dinkel at that time?

A. No, sir.

10. What was his business at that time, his general business?

A. Well, he was manager of the Scotch company, in New Mexico; he was attempting to start a brokerage business and make loans for other people.

11. A general financial agent?

A. Yes, sir. If I am not mistaken he was in the insurance business at that time, if not at that time very shortly afterwards.

12. Do you know whether or not he made any attempt to secure this loan for Mr. McBroom from any other parties besides the Scotch company?

146 A. He told me that he had.

13. Well go on.

A. Dinkel came to me at some time in the summer of 1886, I have no way of fixing the day, other than I should say it was a month more or less, prior to the time at which the loan was made, and told me that he had obtained the consent of the Scotch company to make the loan to McBroom. That he had the money subject to his check, to make the loan to McBroom, but that Jefferson Raynolds and

Joshua Raynolds were so anxious to make the commission themselves, that they had interfered with McBroom, and offered to get him the money for a smaller bonus than he was to pay him, that is Dinkel. I had a number of conversations with Mr. Dinkel, and a number of conversations with McBroom. Finally Dinkel came to me and said to me that Mr. McBroom had been in his office that day, and had offered to pay him a bonus of $6,500 in cash, and two notes, each for $1,000; that he had declined the proposition, and that he and McBroom had parted under such circumstances that it would be impossible for him to ever negotiate with McBroom again in regard to it. He asked me to see McBroom, and try and pursuade him to take the money, and pay the quarter interest as he had agreed to, in the ranch and cattle. I told him that I could not do that. That I had advised McBroom against paying any such large bonus as that. He said he would not, for anything in the world, have the Raynolds have the benefit of that loan, or the commission, and if I could get McBroom to carry out the proposition which he had made to him that day, and keep him from taking the money from the Raynolds, he would give me one-half of the commission. I said to him, "You understand, Mr. Dinkel, that the company cannot take the bonus." He said the bonus was not to go to the company; that the bonus was to be paid to him for his services for McBroom, in inducing the Scotch company to change the whole order of its doing business, to depart from its principle not to loan more than $30,000, and to depart from their practice therefore, in not loaning on cattle. He said he had been working with McBroom for three years, and he thought it only fair he should be paid for it. He asked me if he had a right, under such circumstances, to take the bonus that had been agreed upon, that McBroom should pay him for such services. I told him in my opinion he had. I saw McBroom, I think the next day, and yet I am a little confused as to dates, I see that Dinkel says in his letter, that he saw me on the 23d of September. I have no recollection as to the particular date. It is my recollection that it was four or five days after Dinkel had spoken to me, and four or five days after I spoke to McBroom, after Mr. Dinkel had offered to give me this compensation, before the contract was finally consummated between Mr. McBroom and Dinkel. Unless I am very much mistaken the conversation run over four or five days, yet the contract which I have here, which was finally made between Dinkel and McBroom, is dated the 23d day of September, 1886.

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(Mr. FISKE:) We offer the contract in evidence.

(WITNESS:) I may say that at this same conversation with Dinkel, in which he told me he could not do anything more with McBroom, Dinkel insisted that if necessary, I should agree to examine the title for nothing, or for a mere nominal sum. I have forgotten the number of pieces of real estate in that deed of trust. The deed of trust will show. I would think there is at least fifty different pieces of real estate, the title of which was to be examined. After I had

had a number of conversations with McBroom the following letter was written by McBroom, to Dinkel.

The letter was here marked Exhibit 1, and is as follows:

LAS VEGAS, NEW MEXICO, *September 23d*, 1886.

George J. Dinkel.

148 DEAR SIR: I desire to make the loan of sixty-five thousand dollars, $65,000, I have been talking to you about, and for the term of six years, interest at rate of twelve per cent. per annum. Interest payable first of January of each year: after I have carried this loan two years would like privilege of giving you three months notice, and by paying a bonus of one thousand dollars, you allow me to take up all the loan and pay the said one thousand, or part of the loan and proportional part of the one thousand.

I am willing to give you six thousand five hundred in cash, and two thousand in notes, in two notes, one payable in eighteen months, six per cent., payable semi-annually; one in three years, six per cent., payable semi-annually; you to pay your lawyer's fee.

This proposition to be accepted or rejected at once. If accepted I will remain in the city several days, till the loan is completed. If this proposition is not accepted I will take the money where it is offered to me elsewhere.

Respectfully, W. H. McBROOM.

(Mr. VINCENT:) I then carried that letter to Mr. Dinkel, and after considerable discussion with him, he endorsed on the back of it.

LAS VEGAS, *Sept. 23d*, 1886.

W. H. McBroom, Esq., Las Vegas, N. M.

DEAR SIR: I accept the above proposition provided you pay Judge Vincent his fee for examination of title, and preparing of papers, and date notes August 20th, 1886, as you agreed to do to-day. This to be without prejudice to the contract for one-quarter interest, unless it is accepted.

GEO. J. DINKEL.

149 (Mr. VINCENT:) I then carried that back to McBroom, who wrote on it:

LAS VEGAS, N. M., *September 23d*.

DEAR SIR: I hereby agree to and accept the above proposition.

W. H. McBROOM.

(Mr. VINCENT:) Mr. Dinkel said to me that he insisted on these notes being dated the 20th day of August, 1886, because he had the money ready for McBroom at that time, and it was McBroom's own fault he did not take it.

I had been doing some work in the meantime, on the examination of this title, and a very few days afterwards, I presume the day of the date of the trust deed, the notes, trust deed and chattel mortgage were executed.

14. Was this paper the beginning and end of the trade between Dinkel and McBroom? I mean of the actual loan of money.

A. That is the trade so far as I had anything to do with it.

15. And immediately afterward the money was loaned and the note given?

A. Yes, sir, on that agreement. When Mr. Dinkel wrote the checks to pay McBroom the money, he wrote one check for $6,500, which he handed to McBroom. McBroom endorsed it in blank on the back and started to hand it to Dinkel. Dinkel told him to hand it to me. I took the check and deposited it to my account, and gave Dinkel checks for part of it. Either that day or the next, McBroom executed the two notes referred to in the contract which I have here.

(Mr. FISKE:) We offer them in evidence.

The notes were here marked Exhibits 2 and 3 respectively, and are as follows:

EXHIBIT 2.

$1,000.00. LAS VEGAS, NEW MEXICO, *September* 24, 1886.

150 Three years after date I jointly and severally promise to pay to the order of George J. Dinkel, one thousand dollars, at the First National Bank of Las Vegas, New Mexico, with interest at six per cent. per annum, from date until paid, payable semi-annually. Value received.

W. H. McBROOM.

(Endorsed:) Pay to the order of Wm. A. Vincent without recourse. Geo. J. Dinkel.

EXHIBIT 3.

$1,000.00. LAS VEGAS, NEW MEXICO, *September* 24, 1886.

Eighteen months after date I jointly and severally promise to pay to the order of Geo. J. Dinkel, one thousand dollars, at the First National Bank of Las Vegas, New Mexico, with interest at six per cent. per annum, from date until paid, payable semi-annually.

Value received.

W. H. McBROOM.

(Endorsed:) Geo. J. Dinkel.

16. To whom are they made payable?

A. George J. Dinkel. At the time Mr. Dinkel spoke to me in regard to his right to take this bonus, I had not seen any of the letters introduced in evidence here, or any of the cablegrams, and I did not know that Mr. Dinkel had had any communication with the Scotch company in regard to that bonus, at the time I wrote that opinion. I did not know that there had been such a correspondence until long afterwards. I think some time last summer, although it may have been before. The letter which was read from

me to Dinkel, when Mr. Carson was on the stand, was a reply to the following letter which I received from Mr. Dinkel.

(Mr. FISKE:) We offer the letter in evidence.

The letter was here marked Exhibit No. 5, and is as follows:

151 EXHIBIT No. 5.

LAS VEGAS, N. M., *Dec. 13th*, 1886.

Hon. William A. Vincent, Las Vegas, N. M.

DEAR SIR: I am in receipt of a letter from our home office with reference to the bonus in the McBroom loan, and the company informs me that Mr. Muirhead, its solicitor, has been carefully investigating the usury law, with a view of the determining what the legal position of the company, yourself and myself is, and they say that he has considerable doubt as to whether you and I are not so intimately connected with the company (1), in our official capacities as its law agent and manager, and (2), as *ex officio* members of the advisory board, and that under these circumstances they request that the $6,500 received by us, be paid to the company, as a payment to account of the first year's interest due by McBroom, and that McBroom be notified of such action. After this has been done the company request that you give your written opinion to the effect that all is now in order, and that no further claim can arise against the company in connection with the business.

I now request that you will comply with the wish of the company as above expressed.

Yours truly, GEORGE J. DINKEL, *Manager*.

(WITNESS:) Subsequently I received the following letter.

Marked Exhibit No. 6, and is as follows:

LAS VEGAS, N. M., *February 5th*, 1887.

Hon. Wm. A. Vincent, Las Vegas, New Mexico.

DEAR SIR: I am in receipt of a letter from our head office in Glasgow, in which they say the board are inclined to
152 waive the request contained in their letter of Nov. 20th, that you should repay the sum you received from McBroom, which conclusion they reached after considering your letter. They say, "But they must ask you to obtain from Mr. Vincent the certificate he intimates on page 3 of his letter, he is willing to give, as to the safety of the company's position, and also a guarantee from him to relieve the company of any loss it may sustain, should McBroom ultimately refuse to implement his bargain on the plea of usury. He can have no hesitation in acceding to this request, looking to the very decided opinion he appears to hold regarding the company's position."

Will you please oblige the directors by complying with their request at as early a date as possible.

Yours truly, GEO. J. DINKEL, *Manager*.

(WITNESS:) In response to which I sent the following to Mr. Dinkel, page 426, personal Letter Book No. 5.

FEBRUARY 14TH.

George J. Dinkel, Esq., gen'l manager Scottish Company (Limited).

DEAR SIR: Your letter of the 15th inst. is at hand, and in response will say that I hereby certify that in my opinion, your company has not been guilty of usury in making the loan to W. H. McBroom, by reason of his having paid you for your services to him, and you having paid me for my services in inducing him to take the loan from your company, and I hereby bind myself to save and hold harmless your company, in twice the sum so received by me, for any loss the company may incur by reason of my having received compensation for my services as aforesaid.

Yours truly, WM. A. VINCENT.

17. How many tracts of land do you say there were to examine?

153 A. I don't pretend to be accurate, but I would say there were about fifty.

18. Have you ever examined titles for that sort of property. Are you familiar with the value of examinations of that kind, of lawyer's fees?

A. Yes, sir.

19. What was the fair and reasonable value for the labor performed in the examination of these titles?

Objected to by plaintiff's counsel as immaterial.

Objection overruled.

(WITNESS:) Do you mean the simple examination of the titles, or the preparation of papers and examination of title and certificate of title on a loan of that magnitude?

20. Yes, I mean that.

A. I would say from $2,000 to $2,500.

21. Was that service performed by you for McBroom, or the company, and who paid you?

A. The Scotch company always required the borrower to pay for the examination of the title and preparation of the papers.

22. To what other trouble and expense had you been for McBroom, in and about the making of that loan, if any?

A. I don't remember any other than I have stated.

23. How much or what was the value of your services, that you have described, other than the examination of titles, for instance your trips and endeavors to get the loan for him?

A. I don't know that I could say. I was absent some two or three weeks, and I had the expense of a trip to Chicago.

24. Can you put a minimum value on it?

Objected to by counsel for plaintiff.

Objection overruled by the court.

(WITNESS:) I don't see that that has anything to do with it.

154 (Mr. FISKE:)

25. I will tell you that it has something to do with the case, and I think if you will confine yourself as a witness, and not as a lawyer, you will get along better on the witness stand.

(WITNESS:) I do not believe I would make that trip for less than $500.00 and pay my own expenses.

26. That would be a fair amount for your services and loss of time?

A. I would think so.

27. When, if ever, did McBroom first begin to claim this money, the $6,500 paid Dinkel and yourself, was paid to the company, and not to you two; when did he first begin to claim that to you, claim it was usury, for instance?

Objected to by plaintiff's counsel as immaterial.

Objection overruled.

A. He never claimed it to me at all.

28. He never claimed to you that the money was paid for the benefit of the company?

A. No, sir.

29. Did you ever have any conversation with him in relation to this suit?

A. Yes, sir, I had a great many.

30. Did he release any claim which he might have had against the company, on account of usury?

A. Yes, sir.

31. State that conversation to the jury.

A. Mr. Dinkel advised me that he and McBroom had a conversation on that subject. This is simply preliminary, I am not going to give the conversation. He asked me to meet him and McBroom and talk it over. I met McBroom and Dinkel at the Scotch company's office.

32. When?

A. I cannot give the exact date. I would say it was at least six months before McBroom brought the usury suit, and it may
155 have been a year. Dinkel said to McBroom, that he had spoken to me about what they had said the other day, and that I said that I thought if they made that kind of an arrangement it ought to be made in writing. McBroom said that if Dinkel would not foreclose the mortgage, he would not bring suit against the company for usury. I said again that if any arrangement of that kind was made, it ought to be made in writing, and Dinkel said he was not afraid of McBroom, and that if McBroom said he would not sue, he would not sue.

33. McBroom was present?

A. Yes, sir; he was present.

(Mr. SPRINGER:) I object to this testimony if it is undertaken to introduce it here as a release; it is not competent evidence, and I move that it be excluded from the consideration of the jury.

(The COURT:) I will allow it to stand and will rule on it hereafter.

(WITNESS:) He told McBroom that the Scotch company had instructed foreclosure and he had placed the papers in my hands to write the notice of foreclosure sale, and Mr. Dinkel instructed me to hold the papers, and I did hold them, and did not proceed with the foreclosure.

34. What was the consideration do you say Dinkel stated for withholding proceedings on the foreclosure?

A. I don't remember that Dinkel ever stated any consideration. I think I have stated the circumstances as they occurred, as well as I can remember.

35. What did McBroom say during this time?

A. I insisted that McBroom should make a written release, and he refused to do it.

36. What, if any reason, did he give?

Objected to by plaintiff's counsel as immaterial.
Objection overruled.

A. I don't remember that he gave any. He may have done so.

156 37. Was there anything said during that conversation from which you knew why it was that you were instructed not to bring that suit for foreclosure?

Objected to by plaintiff's counsel.
Objection sustained.

38. Did McBroom, during that conversation, say anything relating to the foreclosure of that mortgage?

A. I don't remember that he said anything except that if Dinkel did not foreclose, and gave him time, that he could get out, and that he would not consent to use that usury suit, except as a last resort, and that if Dinkel gave him time to get out he would not sue. Now I don't pretend to give the language at all.

39. Was there any foreclosure proceedings commenced up to the time this suit was brought?

A. No, sir.

40. Is there anything further about this matter you desire to state?

A. Nothing occurs to me at this time.

Cross-examination by FRANK SPRINGER:

1. This contract, which you have introduced in evidence, dated September 23d, 1886, (Exhibit No. 1,) you state contains the whole arrangement in regard to the loan of $65,000, and the payment of a bonus or commission for it, do you?

A. I think it is.

2. Do you mean to be understood as saying that the transaction was finally concluded on that day, the money paid and the papers executed?

A. No, sir; my recollection is that it was not concluded until several days after that.

3. I understood you to say that you were not aware of any correspondence between Dinkel and the managers or directors of the company in Scotland, on the subject of this loan, until quite recently; was that correct?

157 A. Well, I said I did not know, or meant to say that I did not know there had been any correspondence in regard to the payment of this bonus.

4. Were you not aware, at the time the matter was consummated, on the 25th of September, 1886, that it had been authorized by cable?

A. Mr. Dinkel so advised me. I don't remember whether it was on the 23d, or when it was, but Mr. Dinkel told me that he was authorized by cable to make the loan that he made.

5. Did you see the cable?

A. I have no recollection of seeing it. I think I never did.

6. I wish you would refresh your memory, and say whether it is not a fact that the cable was shown to you at the time, and that you assisted in translating it from the cipher, and wrote out the translation of it?

A. It may be I did. I have no recollection of it.

7. I will refresh your memory in that respect. I think you do not remember it clearly. Examine this cable and the translation attached to it, and state whether that translation is in your handwriting?

A. Yes, sir, that is my handwriting.

8. Does that refresh your recollection as to your having seen the cable at the time of its reception, or shortly thereafter?

A. No, sir. That is certainly my writing, but I have no recollection of ever having written it, or ever having seen it.

9. What is that writing attached to the cable?

A. Do you want me to read it?

10. State in substance what it is. Is it a translation of the cable?

A. I should say that it was; yes, sir.

11. I will ask you whether that is a translation of the cable dated September 23d, 1886, in relation to the loan to McBroom?

A. I should say that it was.

158 12. I will ask you to read the translation to the jury.

A. I will say this, that is certainly my writing, and it appears to be a translation of the cablegram, and in saying that, I have no hesitation in saying I must have translated it, but at this time I have no recollection of it.

13. All I care to know from you is whether that is the telegram from the managers in Scotland, authorizing the loan to McBroom?

A. I presume that it is, and I have no doubt that I wrote the translation.

(Mr. SPRINGER:) I will offer in evidence the telegram and translation, and it can be used for whatever it is worth.

(The telegram and translation was here marked Exhibit No. 7.)

(Mr. FISKE:) We object to the introduction of the paper, on the ground that it is not a true copy of the true telegram offered in evidence on the part of the defense; on the further ground that it is incompetent, because it don't make any difference whether this witness saw it, or whether he did not see it, and for the further reason that any writing of the witness cannot bind the company.

Objection overruled by the court.

Exception reserved by defendant's counsel.

(Mr. SPRINGER:) I will read it.

EXHIBIT No. 7.

"McBroom, directors sanction loan of $30,000, first mortgage at ten per cent., or $65,000 at 12 per cent., decline fourth interest, but get best cash bond possible instead, or get third party buy fourth interest and pay us."

14. The agreement you mentioned as having been made between you and McBroom in the early part of 1886, for the procuring of a loan, was that you should receive $6,500 in case you procured the loan for him, was it not?

159 A. Yes, sir.

15. Was there any agreement by McBroom, to pay you for your services, and for expenses in that connection if you did not procure the loan for him?

A. No, sir.

16. At the time of the conversation you spoke of, between you and Dinkel and McBroom, touching the agreement by McBroom, not to bring suit, do you recollect of preparing a statement of that kind, in writing, for him to sign, which should constitute that agreement?

A. I have no recollection of preparing it. I remember I insisted if any such agreement was made, it should be made in writing.

17. If you reduced any statement of that kind to writing, at that time, did that embody the substance of your conversation, the agreement which you proposed to have him make?

A. I have no recollection of putting anything in writing. If I did I don't know it. I might have prepared it before or afterwards, or at the time, but I have no recollection about any writing of that kind at all.

HUGH LOUDON (recalled).

Direct examination by Mr. E. A. FISKE:

1. Were you the local agent and manager of the Scottish Mortgage and Land Investment Company on the 24th of September, 1889?

A. I was.

2. Had you at that time in your charge, the books and affairs and papers of the company, to show payments made by McBroom,

by or for him or any one else, on account of the $65,000 mortgage referred to?

A. Yes, sir.

3. According to those books, or your knowledge of them, if you have any such knowledge, can you state how much, or about how much, was due to the Scottish Mortgage and Land Investment Company, from McBroom at that time?

160 (Mr. SPRINGER:) I object to this on the ground that they have dismissed their set-off in which these matters are set up.

(The COURT:) What is the object of this testimony.

(Mr. FISKE:) I desire to show to the jury that there has never been any payment of principal or interest in this case, on the original indebtedness; that neither principal nor the interest due, have been paid, and that there remains unpaid on both principal and interest, on each of them, more than the amount claimed by the plaintiff in this case; that is the purpose, and I now offer this witness to prove this fact.

Objection sustained by the court.

Exception reserved by Mr. Fiske, of counsel for defendant.

4. Do you know how the payments were made to McBroom, of the $65,000 loaned by the Scotch company: that is, was the amount paid in checks, or was a portion of it deposited to his credit in the bank?

A. I know how the amount was paid. It was paid in checks.

5. Mr. McBroom stated on the witness stand, that a portion of it was paid by a check to his order for $6,500, another portion was paid by his direction to the First National bank, and another portion to the Second National Bank of Santa Fé, and that the balance was not paid him by check, but was deposited to his credit in the First National Bank of Las Vegas. Is that the fact?

A. No, sir.

6. The amount which Mr. McBroom says was deposited to his credit, was paid to him to his order?

A. It was paid to him by check.

7. And that balance to his order, which he testifies about, was paid to him in a check?

A. Yes, sir.

161 (The COURT:) Does the plaintiff insist on this penalty for that excess of interest, from the 20th of August to the 25th of September?

(Mr. SPRINGER:) I will state to the court, I will withdraw the claim for that interest between the 20th of August and the 25th of September; I also make no claim of interest on the penalty, but stand simply on the claim for twice the $6,500 bonus.

WILLIAM H. McBROOM (recalled).

Direct examination by E. A. FISKE:

1. You stated that that was a check with which you paid the first interest (referring to Exhibit D).

A. Yes, sir.

2. How did it occur that that check was not signed by you, but your name was signed by a man by the name of Raynolds?

A. I instructed Mr. Raynolds when the interest note was due, to pay it out of my balance in the bank, and he himself, drew this check for it.

3. Your balance in the bank consisted of the proceeds of a promissory note which had been discounted by you shortly before that, did it not?

Objected to as immaterial and irrelevant.

Objection sustained by the court.

Exception reserved by Mr. Fiske, of counsel for defendant.

(Mr. Fiske to court:) I do not care to state to this witness what I propose to show; but I will make this testimony material. It can all go to the court, and not to the jury at all, or I will state to the court privately what I expect to prove in the presence of the counsel on the other side.

4. At about this time didn't you and Dinkel sign a joint note and have it discounted in that bank, the First National bank?

A. I borrowed——

162 5. Answer the question. Did you or did you not discount a note, a joint note of yours and Dinkel's, in the First National bank about that time?

A. Dinkel signed a note with me in the bank, about that time.

6. What was the amount of that note?

A. I have forgotten. It was about $3,000.

7. It was over $3,000, was it not?

A. I don't remember. It was about $3,000.

8. It was between $3,000 and $4,000, was it not; was it not the half of $6,500?

A. No sir, to the best of my recollection it was $3,000.

9. You are sure of that are you, it was not any more?

A. I don't think it was.

10. Didn't Dinkel, at the time he endorsed that for you, tell you he would pay that note when it was due?

A. No sir, he did not.

11. Did he not endorse that note with the understanding with you, that he would pay the note, and that should repay you the amount of one-half the $6,500 which he had received from you?

A. No sir, he never said anything of that kind, in any manner, shape or form.

12. There was no such understanding as that between you two, at the time he endorsed it?

A. No sir, nothing like it, whatever.

13. What was the understanding by which Dinkel endorsed your note for $3,000, after you had mortgaged all your property to this company. What was the understanding between you and Dinkel if any; how did it happen he endorsed your note?

A. I spoke to him first about borrowing some money, and asked

him if the Scotch people could loan me $3,000 on my Santa Fé residence. He said he did not think he could, but probably Raynolds would, and he would see him about it. I spoke to Raynolds
163 about it; to the best of my recollection I spoke to him, and it was agreed that Dinkel should go on the note, and then I give a mortgage on the house to secure Dinkel; that I think is correct.

14. You say you gave the mortgage to Dinkel?

A. That is my recollection. That I secured him for going on the note by giving him a mortgage on the house.

15. And you did not give that mortgage to the First National bank?

A. I believe it was given to Dinkel.

16. When was that mortgage given?

A. A short time before this interest became due.

17. And you say there was no understanding between you and Dinkel by which Dinkel was to pay that note when it became due?

A. No, sir, not in the least.

18. No understanding that he was to return to you any portion of that money which you had paid to him?

A. No, sir.

19. Don't you recollect this note you gave, was for $3,400, jointly with Dinkel?

A. No, sir, I don't, I think the note was renewed at the end of a year, and made for a larger sum than it first was.

20. You say the original note was $3,000?

A. Yes, sir, I say it was about $3,000. It was a little more than the interest that was to be paid on the 3d day of December, and I don't think the note was for much, if any, over three thousand dollars.

Cross-examination by FRANK SPRINGER:

1. Was that note ever collected or paid?

A. Jefferson Raynolds sold the house under the mortgage and paid the note, or the mortgage was foreclosed.

164 2. It was paid on the foreclosure of the mortgage of whose property?

A. Of my property. The property I mortgaged first to Mr. Dinkel to secure him on the note.

3. Did Dinkel pay any part of it?

A. No, sir.

4. Did Dinkel ever repay to you any portion of the commission or bonus which you paid over to him?

A. No, sir. Not one cent.

Testimony of Jefferson Raynolds.

Direct examination by Mr. E. A. FISKE:

1. On or about the 31st day of December were you president of the First National Bank of Las Vegas?

A. Yes, sir.

2. About that time was there a joint promissory note of McBroom and George J. Dinkel, discounted at that bank?

A. December 17th, 1886, we loaned them jointly $3,400.

3. That was the amount of the note less the discount, was it?

A. The note bore interest from date, and it was not discounted.

4. State to the jury if you know what was the occasion of the making of that joint note.

A. Well, Mr. Dinkel made application to us for the money for McBroom. He said that McBroom would secure him on some property in Santa Fé, and he would sign the note jointly with McBroom. He said he wished to refund McBroom.

Counsel for plaintiff objects to the witness giving any statements or conversation between himself and Dinkel, with regard to this money, and asks that the latter part of witness' answer be taken from the jury.

Objection sustained.

Exception reserved by defendant's counsel.

165 5. Do you know why Mr. Dinkel was so solicitous for borrowing that money for McBroom?

Objected to by plaintiff's counsel as immaterial, and it calls for declarations of Dinkel which would be hearsay.

6. (The COURT to witness:) Do you know of your own knowledge, why it was Dinkel was so anxious to secure the loan for McBroom?

A. Yes, sir.

7. State why it was.

A. He said he was going to refund to McBroom his share of the bonus.

Counsel for plaintiff object to the answer of witness, and ask that the same be stricken out.

(The COURT:) The first part of the answer is within the objection, and the first part of the answer is stricken out.

(WITNESS:) That is only preliminary to what I have to state, if you will allow me to express myself. Mr. Dinkel wished to return the money to McBroom. He did not have the money to return, and he wanted to make this obligation, and when the obligation came due he expected to pay it himself. He never expected McBroom to pay it. He wanted to refund McBroom his share of the bonus, and therefore they had to make the note jointly, because Dinkel had no means to secure the loan, and McBroom had.

(Mr. JONES to court:) The point in the testimony is this: that Dinkel did not borrow the money for McBroom, but he borrowed it for himself. We will show that by declarations: that this money was borrowed for Dinkel at that time, and that McBroom signed the note as an accommodation maker, and this money was subsequently placed to the credit of McBroom: that seems to me circumstantial evidence that Dinkel borrowed the money and refunded the money

to McBroom, and this witness so knows, the bank loaned the
166 money to Dinkel, and because Dinkel was not able to secure the bank. McBroom signed the note as an accommodation maker, but the money was really loaned to Dinkel, and subsequently placed to the credit of McBroom.

(WITNESS:) That is just what I was going to say.

8. After this $3,400 was borrowed by Dinkel state if you know who got the money, to whose credit it was put?

Objected to on the ground that this witness has not stated that this money was borrowed by Dinkel.

Objection overruled.

Exception reserved by Mr. Springer.

A. It was placed to the credit of McBroom.

9. All of it?

A. Yes, sir.

10. Out of that money so deposited did you pay that check for him (Exhibit D); did you draw it and pay it?

A. Yes, sir.

Cross-examination by FRANK SPRINGER:

1. Whom did you say this loan was made to, Mr. Raynolds?

A. The loan was made to Mr. Dinkel.

2. Who applied for the money in the first place?

A. Mr. Dinkel.

3. On his own account or McBroom's?

A. That is what I was trying to state. It was jointly. It was a negotiation whereby Dinkel wished to pay McBroom $3,400.

4. Just wait a minute and answer my question. On his own account or McBroom's?

A. On his own account.

5. Was McBroom present when the application for the loan was made?

A. I don't think he was. I think the first application came
167 in the shape of a letter written by Dinkel in Albuquerque, to me in Las Vegas, setting forth the whole transaction; at the same time he wished to retract certain things he had said to me, and had written to the Scottish Mortgage Company. It is all set forth in this letter.

6. Did McBroom make any application to you for this loan?

A. I cannot say that he did.

7. Can you say that he did not?

A. No, sir, I don't recollect whether they finally came together and talked it over, or not; they both signed the note.

8. Which of them signed the note first?

A. I think McBroom did.

9. Was there any mortgage given to secure the note?

A. There was a mortgage given to Dinkel to secure the note. The note was given to the bank.

10. You say that note bore interest from date?

A. I think it did, yes sir.

11. What rate of interest did it bear?

A. Twelve per cent. per annum.

12. What did you say was the amount of the note?

A. $3,400.

13. And at what date was the note given?

A. December 17th, 1886.

14. To whose credit was the amount of this note placed in your bank?

A. McBroom's; that is my recollection. I can verify it by going to the books, but that is my recollection, that it was placed to McBroom's credit.

15. The whole amount of the note you think was passed to McBroom's credit?

A. Yes, sir. June 29th, 1888, the note was renewed, interest to date makes the whole amount of the note $3,863.70.

168 - 16. I want to know whether the whole amount of the note was paid to McBroom's credit, at the time it was executed?

A. You mean the $3,400 even, or the proceeds of the note?

17. The note in the first place, whether it was?

A. If the note bore interest from date, the whole amount was $3,400, and was placed to his credit. If the note bore interest from maturity, the proceeds of the note were placed to his credit. I could speak more positively about it by looking at the books. I don't remember now.

18. What would the proceeds of it be if it bore interest after maturity?

A. The note run for one year. It would be twelve per cent. discount. It would be $408.00 off. It would be in the neighborhood of $2,992.00 that would go to McBroom's credit.

19. But you say the note was renewed a year later, for the amount of $3,800 and some dollars?

A. We were at that time doing a great deal of business with McBroom. We had various notes in the bank, and he never was able to pay any of them. I was looking this matter up yesterday, and I found that that $3,400 note was finally merged on the 29th of June, 1888, into the note for $3,863.70, and now just exactly what goes to make up that amount I don't remember. I could trace it out on the books.

20. If that was a renewal of this note, that would indicate the note bore interest from date, would it not?

A. That is the reason I thought it was from date, because the interest for one year would have been just about that much.

21. Do you mean to say that any other things or transactions of McBroom's were merged in that note when you came to renew it?

A. My impression was at the time, that there were not;

169 that it was simply accrued interest on the note that made the change in the principal; but if it was the interest accrued on the old note, the new principal was made up perhaps of some little things of McBroom's, of overdrafts added into this new principal.

22. In that case you treated the transaction as one of McBroom's, didn't you?

A. When the note came due and was not paid by Dinkel, we looked to McBroom for the pay, and he did pay it, too.

23. McBroom paid it?

A. Yes, sir.

24. Did McBroom give you any other note about December 17th?

A. I could not state positively. He gave us a great many notes.

25. Did McBroom borrow any other amount of money, any similar amount of money at that time from you?

A. He was borrowing all the time.

26. State whether or not on the 17th or 18th of December McBroom borrowed any other amount of money of your bank?

A. No, sir, he did not.

27. This note about which you have testified, then, was the only note given by him to you, at that time or on that day?

A. To the best of my recollection, and to the best of the evidence on the books, it was.

28. Now I will ask you whether that note was not for $3,000 even?

A. No, sir, it was for $3,400.

29. I wish you would examine this bank statement and tell me whether that is a statement from your bank, of McBroom's account with your bank?

A. Yes, sir.

30. Look it through carefully, and tell me whether that shows a credit of any note made by McBroom on the 17th or 18th of December, 1886?

170 A. This is 1885. This transaction was in 1886.

31. But examine the credits there; state whether or not they run down to 1886.

A. They run down to July 14th, 1886, but not to December, 1886.

32. Just look on the other side of the paper, and see where that runs to.

A. Yes, sir. December 18th there is a credit of $3,000.

33. For what?

A. A note.

34. Now is that the note about which you have been testifying?

A. I could tell by looking up the transaction in the bank. We did not take any $3,000 note from him at the time we took the $3,400 note from him.

35. How did you come to credit the amount of $3,000 as proceeds of that note?

A. Probably the interest was discounted for one year, making $400.00.

36. Was that the amount of one year's discount about which you testified a moment ago?

A. I could tell by an examination of our books. It would figure $2,992$_{4}$ interest for twelve months on $3,400, and we very often lump

these charges. Whenever we loan for a long time we often make a lump charge of the interest, and in all probability that is the way the discount was made in this case—just even $400. That would be my judgment of it without looking at the books to verify it.

(Mr. Springer:) I will offer in evidence this bank statement.

Statement was here marked Exhibit 8, and is as follows:

Exhibit 8.

171 W. H. McBroom, in acc't with the First National Bank of Las Vegas, N. M.

1885. Dr.	1885. Cr.
	Dec. 18th, note $3,000.

37. If that is the case, then this note did not bear interest from date, did it?

A. No sir, interest from maturity.

38. When the note was renewed for thirty-eight hundred and some dollars, there must have been other transactions merged in it?

A. Yes sir, it is possible.

39. Did Dinkel arrange with you for the payment of any other notes of McBroom's in that transaction?

A. No, sir.

40. These other things that were merged into it were McBroom's individually?

A. Yes, sir.

Redirect examination by Mr. E. A. Fiske:

1. Have you a distinct recollection as to whether all the proceeds of that note were deposited on December 17th in your bank?

A. No, sir, I could not tell you without going to the books.

2. There may have been a reservation out of the total proceeds of $3,400 between the parties themselves?

Objected to by plaintiff's counsel as leading and suggestive.

Objection overruled.

Exception reserved by plaintiff's counsel.

A. I don't know without looking at the books.

3. If you had deducted the amount on the 17th of December from the $3,400 note would not a year afterwards the face of the note have been $3,400?

A. Yes, sir.

Defense rests.

172 *Plaintiff's Rebuttal.*

WILLIAM H. MCBROOM (recalled).

Direct examination by Mr. FRANK SPRINGER:

1. Did you ever make any arrangement with Judge Vincent by which you employed him to secure a loan of $65,000 for you, for which you were to pay him a commission of $6,500?
A. No sir, I never did.
2. Did you ever employ him at all, to obtain a loan for you?
A. No sir, I never did.
3. Did you, at any time before the bringing of this suit, make any agreement with Judge Vincent or Mr. Dinkel, to release your claim against the Scotch company for usury?

Objected to by defendant's counsel as leading.
Objection overruled.
Exception reserved.

A. No sir, I never made any such agreement.
4. State whether or not either of these gentlemen endeavored to obtain such an agreement from you?

Objected to by defendant's counsel as incompetent, immaterial and leading.
Objection overruled.
Exception reserved.

A. Yes sir, they did.
5. State whether or not any paper was presented to you to get you to sign in regard to that matter?
A. Yes, sir.
6. Have you that paper with you?
A. I believe I have. (Witness here produced paper.)
7. By whom was that paper presented to you for signature?
A. By Mr. Vincent, or by Vincent and Dinkel; they were both present, I believe.

173 8. State whether or not you signed the paper, or agreed to sign it.
A. I did not sign it, but refused to sign it.

(Mr. SPRINGER:) I will offer the paper in evidence.
(The paper was here marked Exhibit No. 9.)
(Mr. FISKE:) We make the formal objection to it that it is incompetent, immaterial and irrelevant.
Objection overruled.
Exception reserved.

9. Do you know whose handwriting that is in?
A. Yes, sir.
10. Whose?
A. Wm. A. Vincent's.

(Mr. SPRINGER:) This is written on the letter-head:

William A. Vincent, attorney and counselor at law, 1st National bank block.

LAS VEGAS, NEW MEXICO, *March 5th*, 1889.

"In consideration of the sum of one dollar, to me in hand paid, the receipt of which is hereby acknowledged, and the further consideration of two weeks' delay in the foreclosure of its mortgage, I hereby waive and release to the Scottish Mortgage and Land Investment Company of New Mexico (Limited) and George J. Dinkel any right, claim or demand I may have connected with the subject of usury in relation to the making of the loan to me by said company."

(Mr. SPRINGER:) There is no signature to the paper.

11. (Mr. SPRINGER to witness:) You say you declined to sign that paper?

A. I declined to sign it.

12. I will ask you whether in connection with the borrowing of money from the First National bank by you in December, 1886, there was any agreement between you and Dinkel or between you and Raynolds, by which Dinkel was to repay to you any
174 portion of the money paid by you as a bonus for the loan from the Scotch company?

A. There was no arrangement in any manner, shape or form, at the time the loan was made, and no arrangement with Dinkel at any time, either previous or afterwards. Mr. Raynolds said some time afterwards, after the loan was made, he was going to try to have Dinkel pay the note, but he enjoined on me the strictest secrecy, that I must not say a word to him about it.

13. Did he ever have Dinkel pay that note?

A. No, sir, nor no part of it.

14. At the time of the conclusion of your loan from the Scotch company, and the examination of titles to the lands and mortgages, who prepared the abstracts of title?

A. Mr. Sulzbacher.

15. How long was Judge Vincent engaged in the examination of those titles, if you know?

Objected to by defendant's counsel, unless it is shown witness has some knowledge how long Judge Vincent was engaged in the work.

Objection overruled.

Exception reserved.

A. Yes, sir, I do know.

16. How long was it?

A. About a half a day, or something less than a day.

Cross-examination by A. A. JONES:

1. You say that you never employed Judge Vincent to negotiate a loan for you?

A. Yes, sir, I do.

2. Don't you know that Judge Vincent made a trip East for the purpose of getting a loan for you?

A. No, sir, I do not.

3. Don't you know that he telegraphed out here that he had secured the money for you?

175 A. No sir, I do not.

4. Didn't you talk to Mr. Ridgeley, Judge Vincent's father-in-law, in reference to this loan?

A. I was talking about my ranch property with Ridgeley in 1887, when I was making a trade with Newby, but I have no recollection of having talked with him in 1886.

5. Did you employ any one else to obtain this loan for you except Dinkel?

A. I don't remember that I did.

6. Didn't you ask Charles Rathbun to try and raise the money for you?

A. Early in the spring of 1886, when I was talking with Dinkel about the loan first, I think he spoke to Rathbun about it.

7. I will ask whether you spoke to Rathbun about it.

A. I don't remember whether I did any talking with Rathbun myself, about it, or not, I probably did.

8. What did you offer Rathbun if you had a conversation with him about it, to secure the loan for you?

A. I don't remember what I did offer him.

9. Did you offer him anything to get the money for you?

A. I presume there was something offered.

10. Did you have any talk with Jefferson Raynolds or Joshua Raynolds in reference to obtaining a loan for you?

A. Seems to me I had some talk with them in the summer of 1885, about something of that kind, and I may have had at other periods. They were aware of the fact I wanted to borrow some money.

11. What bonus did you offer them?

A. I don't know what bonus I offered them. I don't remember that I offered them any.

12. During the summer of 1886, from time to time, espe-

176 cially along in July and August of that year, you told Dinkel, didn't you, that you could get the money from other parties?

A. I don't remember.

13. Weren't you negotiating with other parties for the same loan, at the time you were negotiating with Dinkel?

A. I think I was trying the fore part of that summer, after I first tried with him, I think I did.

14. To whom did you make any other application?

A. I don't remember now.

15. Do you mean to say Mr. McBroom, that in a transaction involving as much as $75,000, and involving the proposition to pay a bonus for the securing of such a sum as that, that you cannot remember to whom you made an application for such a loan?

A. There was no reason for trying to remember where I asked for the loan and did not get it.

16. You were needing money pretty badly that year, were you not?

A. Yes, sir.

17. Dinkel told you in the first place, his company did not loan over $30,000, didn't he?

A. Yes, sir.

18. He also told you that his company could not loan as much as $65,000, didn't he?

A. In the early part of our transaction.

19. At that time you were needing money badly, were you not?

A. Yes, sir.

20. Now do you mean to say, when you made that application to Dinkel, and he told you his company did not loan that amount of money to one person, that you did not make application to anybody else, to secure the loan for you?

A. I did not say I didn't make application.

21. Did you make any efforts to obtain that loan from any person other than Dinkel?

177 A. I remember some effort was made through the Rathbun friends.

22. You now remember about that, do you?

A. I stated a few moments ago I thought so.

23. Now what bonus did you offer Rathbun?

A. I don't remember, now, what it was.

24. Did you make application to anybody else besides Rathbun for that loan?

A. I may have written to other places, where I was told money could be borrowed, but I don't remember other parties.

25. Then you mean to say that after Dinkel had said his company could not make the loan, that you made an application to Rathbun, and that you have no recollection of having made an application to anybody else at all?

A. I have some kind of a recollection that Mr. Raynolds told me he thought the Chemical National bank would loan it, and he had written to that bank, but they would only loan it on short time. I think he said something to that effect. I think he wrote them to that effect.

26. Still you had nothing definite on which to depend, except this prospect of getting it from the Scotch company, did you?

A. I may have had some sources that I have forgotten now.

27. Will you please explain to the jury why, in this letter to Dinkel, dated September 23d, 1886, you wrote this statement: "This proposition to be accepted or rejected at once. If accepted I will remain in the city several days until the loan is completed; if this proposition is not accepted I will take the money where it is offered to me elsewhere"? Explain to the jury why you put that in the letter.

A. I can't tell now what source that was from.

28. That is your handwriting, is it not?

178 A. It appears to be. Yes, sir.

29. And that is your signature under that?

A. Yes, sir.

30. Now, Mr. McBroom, if you hadn't promised some one else to pay a bonus equally as great as the bonus which you promised to pay Dinkel, and did have a proposition from any one else to make you that loan, where you were to pay a much less commission than that which you offered to Dinkel, would you not have accepted that instead of accepting the proposition of Mr. Dinkel?

A. It would appear so.

31. If you could get money cheaper at one place than at another, which place would you get it, where you could get it the cheapest or where you had to pay more for it?

A. I would try the cheap place, but I didn't strike any of the "cheap places."

32. Then you didn't have a proposition from any one to get this money for you for less than you were to pay Dinkel, did you?

A. I have forgotten altogether what source I supposed that was coming from.

33. But it must have been some source that was to cost you as much for obtaining the loan as you were to pay Dinkel?

A. Possibly so

34. You stated in your examination when you and Dinkel signed that joint note to the bank that you wanted the money for yourself; that it was a loan for you, didn't you?

A. Yes, sir.

35. What did you want with the money, Mr. McBroom?

A. I wanted to pay the first interest on the mortgage, on the Scottish mortgage money.

36. When was that first interest note to the Scottish Mortgage Company due?

179 A. I think the first interest note fell due about the 31st of December, 1886.

37. And when was that note signed? I mean the note which you gave to the bank?

A. Two or three weeks, or a short time before the interest note was due. I think probably I was here, and wanted to make arrangements before I went home to the ranch.

38. Was not the note signed on the 17th of December?

A. I don't remember as to that, exactly.

39. At what time was the money placed to your credit by this statement? (Exhibit 8.)

A. Is appears to have been put to my credit on the 18th.

40. Now will you explain to the jury, why it is that in order to pay a note due on the 31st of December, that you signed a note and paid interest on it from the 17th or 18th of December, in order to obtain the money?

A. Because I was here in Las Vegas about the 18th of December, or whatever time this note was made, and I lived at my ranch 115 miles from here, and I did not want to come back here on the 31st of December.

41. Would it not have been just as easy, Mr. McBroom, to have

made arrangements with the bank to have that interest start from the time you needed the money?

A. I don't know that they would have been willing to have done that.

42. You didn't ask them anything about that, did you?

A. I don't remember that I did.

43. Now Mr. McBroom, in regard to that release, you deny absolutely that you ever told Mr. Dinkel or Judge Vincent, that if they would postpone the foreclosure of that mortgage, that you would not start this suit, do you?

180 A. I deny positively that I ever made such a promise, or such a remark as that.

44. Didn't you say if the foreclosure of that mortgage should be delayed until you could get the money and get out, that you would not bring suit against the company for usury?

A. No sir, I don't remember saying that.

45. Didn't you say in substance that?

A. No sir, I don't remember that I did.

46. Didn't you say something that was equivalent to that?

A. No sir, I don't remember that even.

47. Didn't you say something equivalent to that more than once?

A. I don't remember that I said so at all.

48. Well, what did you say at that time?

A. I think I may have said that I did not anticipate at this time, bringing this usury suit, but if I had any rights in the matter I did not propose to give them away, or whatever rights I had I would not give them away.

49. Didn't Dinkel tell you at that time he had been instructed to foreclose that mortgage?

A. I think Dinkel said to me at some time, maybe more than once, that he expected the company to instruct him to foreclose the mortgage, or that they had done so, but I don't remember that he did so then.

50. Didn't he say the papers were in Judge Vincent's hands for foreclosure?

A. I don't remember that he told me so then.

51. Hadn't Judge Vincent told you the papers were in his hands for foreclosure?

A. I think I remember Judge Vincent also told me, the Scotch people were urging them, or something to that effect, to foreclose this mortgage, but I don't remember that he said so. He may have said so.

52. Didn't you ask them not to foreclose?

181 A. I think I have said several times on each of these occasions, when they were telling me the Scotch people had instructed them to foreclose, I told them I did not think there was any occasion for it; that things would improve after awhile, and I would be able to get out.

53. Don't you know that papers were in Judge Vincent's hands for foreclosure, as early as January, 1888?

A. No, sir, I don't remember.

54. As early as January, 1888, don't you know that Dinkel had been instructed to foreclose?

A. They told me something of that kind, but I cannot fix the date.

55. Was there anything said to you on or about the month of January, 1888, by Judge Vincent or Mr. Dinkel, that I was at that time writing out the notices of foreclosure?

A. No, sir, I don't remember that.

56. Didn't you know I was doing that?

A. No. I only remember that each or both of them did tell me at some time, that the Scotch people wanted to foreclose, but I cannot fix any date.

57. Don't you remember passing through the front room of the office, down there on Bridge street, at the time our stenographer, Coombs, and myself, were comparing the description of the property in the notice of foreclosure sale, and the description of the property in the trust deed?

A. That may have been so, but I don't remember it.

58. Now Mr. McBroom, why was it that foreclosure proceedings on that mortgage were stayed from January, 1888, until long after the commencement of this suit?

A. I don't know that I can tell you.

182 *Surrebuttal.*

WILLIAM A. VINCENT (recalled).

Direct examination by Mr. E. A. FISKE:

1. You heard the testimony of Mr. McBroom, as to the time you were employed in examination of these titles. Have you ever informed Mr. McBroom as to the time you spent in investigation of that title?

A. I don't remember that I ever did.

2. Has he any means that you know of, of estimating the time which you were employed in the examination of that title?

Objected to by Mr. Springer on the ground that that is a matter of inference.

A. I do not know.

3. You don't know that he has any such means?

A. No, sir.

4. McBroom said something about an abstract of the title of that property having been prepared by Mr. Sulzbacher. Did you ever see that abstract?

A. I don't remember to have ever seen the abstract prepared by Mr. Sulzbacher.

5. Upon what did you base your determination as to the title, your own personal investigation, or the investigation of Mr. Sulzbacher, or anybody else?

A. On both.

6. In what way?

A. Mr. Sulzbacher or Mr. McBroom. I have forgotten which, gave me something in the nature of an abstract, which had been prepared by somebody else, I have forgotten who. It was not prepared by Mr. Sulzbacher. I used that as an index in the examination I made. I had gone over all the records in the probate clerk's office some time before the loan was actually made, and there were a number of deeds and things that were not recorded, which I examined by myself and in connection with Mr. Sulzbacher,
183 prior to their being recorded I think, I am not sure about that, at any rate Mr. Sulzbacher and I had a meeting, and went over carefully the different pieces of property, and talked about them, the shape they were in. It is true that I had considerable confidence in what Sulzbacher said about the titles, and talked to him about them.

7. As a final result did you pass upon that title upon your own examination and judgment, or upon the examination and judgment of somebody else?

A. I personally passed on it, on my own judgment, of course, but I had a great deal of respect for Sulzbacher's judgment, and I took that into consideration. I was very glad that Sulzbacher knew as much about the title as he did.

8. Were you jointly engaged in the examination of the title?

A. With Sulzbacher?

9. Yes, sir.

A. I don't remember that we ever went to the probate clerk's office together. My recollection is we talked in his office or in mine. We had this index and some patents and deeds. Mr. Sulzbacher had a great many of them in his safe.

10. Unrecorded patents?

A. I think some were recorded and some unrecorded.

11. At the time you were employed by McBroom to secure this loan from him, had you at that time, or did you between that time and the final loan made by Dinkel, make examinations in relation to the title of this property or any portion of it?

Objected to by plaintiff's counsel as improper surrebuttal.

Objection overruled.

Exception reserved.

A. At the time I talked to Crawford and Ridgely and
184 Brinkerhoff, I don't believe I had ever made any examination of the title at all. At least I have no recollection of ever having examined it. I can't remember when I first began looking into the title. It was some time before the loan was made, and I had examined the title of all the pieces I certified to and put in the trust deed, at the time the trust deed was made; I find on looking at the trust deed here that there are fifty-six paragraphs of different tracts of land, and a great many of them seem to have several pieces in them, I have not been able to count how many there are.

(The COURT to witness:) Do you remember how many links there were in the chain of title of all the tracts?

A. My impression is there were very few.

(The COURT to witness:) Do you remember how many incumbrances there were on all the property?

A. No sir, I don't remember how many there were, but you see an examination had to be made in regard to the brand being recorded, and chattel mortgages, and it is almost impossible for me to say at this late day; I guess it is about five years now nearly, 1886, very near five years, it is impossible for me to remember all I did.

(The COURT to witness:) You think there are more incumbrances of record, than instruments showing the chain of title?

A. No sir, I think not. I have no recollection in regard to the circumstances at all; there is an impression on my mind there were several, but I cant ot pretend to be accurate about that. I did not expect any question of this kind to be asked me when I was put on the stand, and I made no investigation of the subject. Of course my recollection is very vague and uncertain.

This was all the testimony introduced in said case.

Case closed.

(Mr. JONES to the court:) I desire to make a motion
185 at this time, and that motion is this: That the court instruct the jury to find for the defendant, for the reasons set forth in the motion which was filed at the time the plaintiff had closed his testimony, and for the further reason that the testimony shows conclusively that the defendant has never received any part of this bonus; and it further shows conclusively, that the defendant, at the time of the receipt of this bonus, had no knowledge that the bonus was received, and also at the time of the receipt of this bonus, the agent who received the bonus, or Mr. Dinkel who received it, had no authority from the defendant to receive it, and that the particular transaction which the evidence discloses as being carried out, was not authorized by the defendant. And also that the evidence discloses that this defendant was a resident of Scotland, and was not a resident of the Territory of New Mexico, and not presumed to know the laws of the Territory of New Mexico; and the evidence discloses as a matter of fact that they did not know there was any usury law existing at that time in the Territory.

Motion denied by the court.

Exception reserved by defendant's counsel.

The Judge's Charge.

District Court, Fourth Judicial District, County of San Miguel, Territory of New Mexico.

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED).

Instructions of the Court.

GENTLEMEN OF THE JURY: The plaintiff, William H. McBroom, commenced this action against the defendant corporation,
186 _ The Scottish Mortgage and Land Investment Company, to recover the pecuniary penalty given by the laws of the Territory to any person from whom interest has been taken or exacted in excess of twelve per cent. per annum, for the use or loan of money, whether such illegal interest has been taken directly or indirectly, by means of discount, commission, agency, or any other subterfuge. The plaintiff's cause of action is purely statutory, and is based upon the following provisions of the general laws of this Territory of 1884:

1737. Any person, persons, or corporation, who shall hereafter charge, collect, or receive from any person, a higher rate of interest than twelve per cent. per annum, shall be guilty of a misdemeanor, and upon conviction thereof, before a district court or justice of the peace, shall be fined in a sum of not less than $25 nor more than $100; and such person, persons, or corporation, shall forfeit to the person of whom such interest is collected or received, or to his executors, administrators or assigns, double the amount so collected or received, upon any action brought for the recovery of the same within three years after such cause of action accrued.

1738. The provisions of this act shall also apply to any person, persons, corporation or officer of the same, who may charge, receive, or collect any higher rate of interest than twelve per cent. per annum, by means of discount, commission or any other subterfuge.

The plaintiff claims that on or about the 25th day of September, 1886, at this county, the defendant corporation loaned him $65,000, in evidence of which loan he, the plaintiff, delivered to the defendant, his certain promissory notes, aggregating said amount, whereby he promised to pay defendant said amount at the time and in the manner therein stated, with interest thereon from August 20th, 1886, at the rate of twelve per cent. per annum, and that to secure payment thereof he, at or about such time and place, delivered to the defendant one real-estate mortgage and two chattel mortgages. Plaintiff further contends that in addition to the twelve per cent. interest, stipulated to be paid in said note, for the
187 use of the money so loaned him by the defendant, the defendant exacted and took from him, in consideration of such

loan, the sum of $6,500. The defendant corporation denies every material allegation in the plaintiff's declaration, and thereby imposes upon the plaintiff the necessity of satisfying you, by a preponderence of the evidence, of the proof of every material allegation contained in his declaration.

You are instructed that the maximum legal rate of interest in this Territory, at the date of this transaction between the plaintiff and defendant was $12 for the use of $100 for the period of one year, or as it is technically called, twelve per cent. per annum, and any sum charged for the use of money in excess of twelve per cent., as fixed by the statute, is usury. The usurious rate so taken or charged, need not appear on the face of the papers evidencing the loan. The law is that every shift, device, trick or subterfuge which may be resorted to, for the purpose of evading the statute against usurious loans, will bring the transaction within the statute as clearly as if its provisions had been directly and in terms violated, and if the transaction is in truth and in fact a loaning of money, or a payment made, or agreed to be made, greater than the interest on the loan at the rate of twelve per cent. per annum, such transaction is usurious.

In this case, if you believe from the evidence that the plaintiff borrowed from the defendant the sum of $65,000, and paid or agreed to pay therefor, any sum greater or in excess of the interest at the rate of twelve per cent. per annum, on the money so borrowed, this would render the transaction usurious, and under the laws of this Territory would give plaintiff the right to recover of the defendant double the amount of the excess charged or paid, over the legal rate, and this would be so, even though the parties called
188 the excess so paid or agreed to be paid, a present or bonus, or a commission from the plaintiff to the defendant, or a commission allowed or paid defendant, as an inducement to make the loan.

This defendant is a private foreign corporation, organized under the laws of Great Britain, among other things, for the investment of money in landed securities, and is and was at the time of the transaction in question, authorized to do business in this Territory. A corporation of this kind is a mere legal conception or entity, and as such has no mental, rational or physical capacity to act or carry on business except through its officers, usually known as directors or managers, but when such corporation appears as a party in court, it is entitled to the benefit of the laws to the same extent as private persons. This corporation is doing business in this Territory through its agent, and you are instructed that you have no right to disregard the testimony of defendant's witnesses or proofs, through caprice, or without cause, merely for the reason that they are in the employment of, or are furnished by a corporation. The credibility of defendant's witnesses should be judged by you precisely the same as you judge the credibility of other witnesses. It is your sworn duty in this case, to try this cause and to decide it, precisely the same as you would if it were a suit between two of your neighbors, and the fact that the plaintiff is an individual and

the defendant a corporation, should make no difference to you. In considering and deciding the case, you should look solely to the evidence and the facts, and to the instructions of the court, for the law of the case, and find your verdict accordingly, without any reference to who is plaintiff or who is defendant.

You have heard the name of the agent, or manager of the defendant, alleged to have transacted the business with this plaintiff, out of which this controversy arose, and in a case like this
189 the law is that when the directions of the principal to its agent or manager are generally as to business which he is appointed to transact, then the principal, the defendant in this suit, would be held to have confided in the discretion of such agent or manager, and the principal would be answerable for the acts of such agent or manager, in the performance of the duties required of him.

You are further instructed that if a tort or wrong is committed by an agent, in the course of his employment, while pursuing the business of his principal, or following the instructions of such principal, the principal will be held liable for the act.

The defendant requests me to give to you certain instructions. Certain ones I give, and certain ones I refuse. Those refused are marked on the margin, and I will not read them. Those I give you as the law in this case I shall read to you.

The court instructs the jury for the defendant, that if they believe from the evidence, that the defendant company ratified the act of its agent, Dinkel, that said ratification is not binding upon the defendant company, unless at the time of the ratification, all the material facts of the transaction complained of in this suit, were known to it, and that the contract complained of, was in violation of law, would be a material fact to be known by defendant.

"If you believe from the evidence, that McBroom agreed with Dinkel not to institute a suit for usury, in consideration of Dinkel extending the time for foreclosing the mortgage, and that in pursuance of such agreement Dinkel did extend the time for foreclosure, you are instructed that such agreement operated as a release of his claim against the company, and you will find for the defendant.

"If you believe, from the evidence, that Dinkel executed a note with McBroom, in full satisfaction of the $6,500, alleged to
190 have been paid by McBroom, then that said act operated as a release of McBroom's claim, and you will find for the defendant."

The plaintiff asks me to give the following instructions, which I give you as the law of the case:

"If an agent, authorized by his principal, to loan money only for the lawful rate of interest, makes a loan, and exacts for his own benefit, a bonus or commission greater than the lawful rate of interest, without the authority, knowledge, consent or acquiescence of his principal, the loan is not thereby rendered usurious.

"Where, however, an agent having a general authority to loan money, charges and receives, by means of discount or commission, interest in excess of twelve per cent. per annum, and his act in so

doing is within the general scope of his authority, and is either previously authorized or subsequently ratified by the knowledge and acquiescence of the principal, then the loan is usurious, and the borrower is entitled to recover double the amount of the money so received by the agent, even though it was retained by the agent for his own benefit, and the principal got no part of it.

"Whether the act of the agent, in charging and receiving a usurious discount, commission or bonus, was within his authority, or was subsequently ratified by the principal, is a question to be determined by the jury, from all the facts and circumstances of the case.

"It is claimed by the plaintiff in his case, that the leader is a corporation, organized in Great Britain for the express purpose, among other things, of loaning money in the United States, upon real-estate and chattel mortgages; that the general powers of this corporation are vested in a board of directors, and this board is expressly authorized to appoint a manager or managers, and to fix his powers and duties; that under this authority the board of directors created the office of manager, for the management, control and conduct of its business in the Territory of New Mexico,
191 and designated the town of Las Vegas as the principal place of business of the corporation in New Mexico; that at the time of the making of the loan in controversy, George J. Dinkel held the position of general manager of said company, at its principal place of business in New Mexico, and had an office as such general manager, in Las Vegas. If you find these facts to be true, it becomes necessary to inquire, what in law was the position of the said Dinkel in relation to business between the said company and outside parties?"

In order to enable you to understand this clearly, the court will first state to you a few general principles of law relative to corporations and their officers, managers and agents.

A corporation is an artificial being, created by authority of law, composed primarily of the stockholders, who associate themselves together for the purpose for which it is formed. From its very nature it is incapable of doing any act except through its officers and agents. All the powers of the corporation are exercised by its directors and managing officers, and as they constitute its only direct medium of communication with outside parties, they must, in respect to all external relations, be considered as identical with the corporation itself. As the corporation can act only through its managing officers, when these do any act within the general scope of the powers of the corporation and the purposes for which it is formed, the corporation itself, in the view of the law, is presumably present, and by implication sanctions their act. If the business of a corporation is transacted by a general managing officer or agent, who is held out to the world as such, and is suffered to exercise general authority in respect to its business, the corporation is bound by his acts, within the scope of the powers assumed by him, if reasonably incidental to the purposes and powers of the corporation, in the same manner and to the same extent as if the
192 authority therefor was expressly granted. In respect to the

management of its business, a general managing officer or agent is the representative, the physical embodiment, of the corporation, and may do in the transaction of its ordinary affairs, what the corporation itself could do, and his act within the general scope of its powers, is the act of the corporation.

Such an officer or agent will bind the corporation by any act done within the scope of his employment or powers, even if done against instructions, if such instructions were not communicated to the party with whom he deals. Secret instructions cannot affect third parties dealing with such officer or agent.

The corporation, like any other principal, is liable to third parties for whatever such officer or agent does, or says; whatever contract, representations, or admissions he makes; whatever negligence he is guilty of, and whatever fraud or wrong he commits, provided the officer or agent acts within the scope of his apparent authority, and provided a liability would attach to the principal if he were in place of the officer or agent.

As already intimated, a corporation is liable, not only for the contract made by its agents within the scope of their general powers, but also for the consequences of the wrongful acts of such agents, while engaged in the business of their employment, to the same extent and in the same manner that individuals are. This extends to acts which are prohibited by law. The liability of a corporation for the consequences of the acts of its officers and agents, done within the scope of their general powers, is not affected by the fact that the act which the officer or agent has assumed to do, is one which the corporation itself, could not rightfully do. A corporation may do wrong through its agents as well as a private individual, and it may be held liable for such wrongful act of its agent in a statutory action for a penalty for double damages.

193 If the act of the officer or agent of the corporation was in the first instance not binding upon it, because not within the scope of his authority or employment, it may nevertheless become binding by subsequent ratification as fully as if it had been originally authorized. That is to say, the unauthorized act of an agent, whether of a corporation or an individual, if ratified by the principal, is of the same effect as if previously authorized.

The ratification of an authorized act may be express, or it may be by implication from the conduct of the parties. If a corporation or an individual, upon obtaining knowledge of an unauthorized act of its officer or agent, wishes to escape liability therefor, it must disavow the act within a reasonable time after obtaining such knowledge, and must give notice to the other party to be affected by it; otherwise, the law will presume an acquiescence, and this is equivalent to an express ratification.

It is well settled that a principal who neglects to promptly disavow an act of his agent, done beyond his authority, makes that act his own, and is bound by it the same as if he had previously authorized it, and the maxim which makes ratification equivalent to previous authority, is applicable as much to a corporation as to an

individual, and is equally to be presumed from the absence of dissent.

A disavowal under such circumstances, in order to relieve the corporation from liability for the unauthorized act of its officer or agent, must be in good faith toward the other party, and must be accompanied by an offer, so far as reasonably practicable, to restore such party to the condition he was in before such act was done. A mere dissent or disapproval expressed to the agent or officer, himself without any *bona fide* effort to restore the other party affected by the act to his original situation, or to notify him of such disapproval, so that he may have an opportunity to take steps for his own protection or redress, is not such disavowal as the law contemplates, and will not relieve the principal from liability.

194 Applying these principles of law to this case you are instructed that if Geo. J. Dinkel was the general manager in New Mexico for the Scottish Mortgage and Land Investment Company of New Mexico (Limited), and as such entrusted with the general management, conduct and control of said company's business of loaning money in New Mexico, and in such capacity of manager, made the loan of $65,000 to the plaintiff, McBroom, for and on behalf of said company, and in addition to receiving from McBroom interest notes for the payment of interest on said loan, at the rate of twelve per cent. per annum, charged and received from the said McBroom the sum of $6,500 in cash, as a commission or discount for the making of said loan, and in so doing, assumed to the said McBroom to be acting for the benefit of said company, and not for himself personally, and McBroom had no knowledge or information of any want of authority in the said Dinkel, to charge and receive such commission for and on behalf of said company, then, if you find these facts established by the evidence, the transaction was usurious, and McBroom is entitled under the law to recover back from said company double this amount of $6,500 so paid in excess of twelve per cent. interest, which would be $13,000.

If you find that defendant company, after its directors obtained knowledge of the act of said Dinkel in charging or receiving the said commission or bonus, if you find he did charge and receive the same, acquiesced therein and failed to disavow such act of said Dinkel up to the time of the bringing of this suit, then said company by such conduct, has made the act of Dinkel its own, and is liable to McBroom for double the amount of the commission or bonus so charged and collected.

If you find from the evidence that George J. Dinkel, at the time of making the loan to McBroom in question, was the general manager of the defendant company in New Mexico, and was ex-
195 pressly authorized by the president and board of directors of the company, to make the loan of $65,000 to McBroom, with interest at the rate of twelve per cent. per annum, and in addition to such interest to obtain from McBroom a commission or bonus for making such loan; and that said Dinkel, in pursuance of such authority, made the loan to McBroom for said company, and took his note or notes for the principal and interest thereon, at the rate of

twelve per cent. per annum, and in addition to such interest charged, collected and received from McBroom the sum of $6,500 as a commission or bonus, in such case you are instructed that Dinkel's act was the act of the company; that the charging and receiving of said $6,500 was unlawful and usurious, and McBroom is entitled to recover in this action double that amount as a penalty, which would amount to $13,000—no matter who got the benefit of said commission, and upon this state of the evidence, if you find it to be true, your verdict will be in favor of the plaintiff for $13,000.

Whether the act of Dinkel in charging, collecting or receiving the said $6,500 as a commission or bonus, if you find he did so, was originally authorized or subsequently ratified by the defendant company, is a question of fact to be determined by the jury from all the facts and circumstances in evidence before you.

Gentlemen of the jury, the defendant also submits the following questions for you to answer:

1st. State whether or not the defendant company ever received any part of the $6,500 paid by plaintiff McBroom, to George J. Dinkel.

2d. State whether or not you find that George J. Dinkel ever paid any of the $6,500 received by him to the defendant company.

Yes or no will answer these two questions.

3d. State whether or not at the date of the institution of
196 this suit, plaintiff McBroom had paid any part of the $6,500 or any interest thereon, and if so, how much?

If you answer this question by yes, after the word yes you should state the amount; if you answer it by the word no, there is no further answer required. Your foreman can also sign this paper.

If you find in favor of the plaintiff, the form of your verdict will be: We, the jury, find for the plaintiff and assess his damages at the sum of, double the amount of the unlawful interest taken. If the amount is $6,500, it will be double that; if it is $5,000, it will be double that amount. If you find in favor of the defendant, the form of your verdict will be: We, the jury, in the above-entitled cause, find our verdict in favor of the defendant. When you retire appoint one of your own number foreman, and when you agree upon a verdict, he will sign the verdict in your behalf.

Counsel for defendant at the time of the giving of the foregoing instructions excepted as follows:

To the refusal of the court to give the instructions asked by defendant; to each and all the instructions given by the court, asked for by the plaintiff and given by the court, to all the instructions given by the court of its own motion, and also because the court failed to instruct as to the law of the case.

District Court, County of San Miguel, Territory of New Mexico.

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED). } No. 3486.

Defendant asks the court to instruct the jury as follows:

Refused.

197 If Dinkel, without the knowledge of the defendant company, exacted more than the legal rate of interest, the loan in question was not rendered usurious, and you must find for the defendant.

Refused.

If the jury believe from the evidence that Dinkel was authorized to lend money at a lawful rate of interest, but that he exacted for his own benefit more than the lawful rate, without authority from or knowledge of the defendant company, the loan was not thereby rendered usurious, and you will find for the defendant.

Refused.

The court further instructs the jury that an authority to loan money at a legal rate of interest does not include by implication the authority to loan at an illegal rate. An authority to violate the law will never be presumed, and unless you believe from the evidence, that Dinkel was authorized by the defendant company, to loan money at a usurious rate of interest, you will find for the defendant.

Refused.

The court instructs the jury that the directors of a corporation are merely the agents of the stockholders of the company. That the directors of a corporation have no authority to commit an illegal act on behalf of a corporation, and that they have no right or power to authorize any one else to do so.

Unless you believe from the evidence, that the defendant company was organized for the purpose of making illegal loans, or that the stockholders of defendant company, at a properly called meeting, had authorized the particular transaction in controversy, you will find for the defendant.

Refused.

The court instructs the jury that in case of a usurious loan the borrower is equally guilty with the lender, and that in such a case as the present one, McBroom knowingly violated the law, he has no merit to plead in his defense, while the lender, who acts
198 through an agent, as the defendant company did in this case, is wholly innocent and entirely free from moral guilt, unless it authorized, ratified or received benefit from the bonus.

Unless you believe from the evidence that the defendant com-

pany authorized, ratified or received benefit from the $6,500, alleged to have been paid to McBroom, you will find for the defendant.

Refused.

The court instructs the jury that it smacks strongly of fraud in the borrower, to enter into a contract with the lender's agent to pay a bonus or illegal interest, without any inquiry whatever, into the authority of the agent to make an unlawful contract, which the borrower knows cannot be enforced, for in this way the borrower, in connivance with the agent, gets the lender's money, with the intent, demonstrated by his subsequent plea of usury, to avoid the fulfillment of his contract. If you believe from the evidence, that McBroom borrowed the money and paid $6,500, without inquiry into Dinkel's authority to charge the same, and Dinkel was not authorized to charge or collect illegal bonus or interest, you will find the defendant not guilty.

Refused.

If you believe from the evidence, that McBroom paid $6,500 to Dinkel, knowing that it was not to be paid to the defendant company, you will find for the defendant.

Refused.

If you believe from the evidence, that at the time of the commencement of this suit, McBroom had not paid defendant company, the money he had borrowed from it, with legal interest, and in addition thereto some further sum, you must find for the defendant.

Refused.

199 The jury are instructed that it is legal and proper for a borrower to pay to any person who shall secure for him a loan of money, a reasonable compensation for such services in so securing such loan, and if the jury believe from the evidence that the amount of $6,500 was a just and fair compensation for the services rendered to plaintiff in securing for him the loan of $65,000, then the jury should find for the defendant.

Refused.

The court instructs the jury that where an agent is authorized to loan money for another, he has no authority to violate the law in so doing, and that where an agent has violated the law in the discharge of his duties, such violation cannot be imputed to the principal, unless it be shown that the principal authorized or consented to it. Hence, unless you believe from the evidence, that the defendant company authorized or consented to the violation of the usury law, you will find it not guilty.

Refused.

The court instructs you that if the agent collected the $6,500 as a bonus or commission for his own exclusive benefit, and the defendant received no part of it, such collection will not constitute usury

on the part of the defendant, whether the defendant company knew of it or not.

Refused.

The court further instructs you that if you believe from the evidence, that six thousand five hundred dollars was paid by the plaintiff, McBroom, for procuring the loan, and not as excessive interest, you will find a verdict for the defendant.

Refused.

The court instructs the jury, that if you believe from the evidence, that the defendant company disaffirmed the contract complained of, so soon as it had knowledge of it, and it was not the contract authorized by it, you will find a verdict for the defendant.

Refused.

200 You are further instructed that where an agent is authorized to perform a certain act, it does not authorize him to perform another and different act. If you believe from the evidence, that Dinkel did not carry out his instructions from defendant, but accepted a bonus or commission in an entirely different way, and for an entirely different purpose than as directed, then you will find for the defendant.

Refused.

You are further instructed that the mistake of law of a resident of a foreign country, is a mistake of fact. If you believe from the evidence, that the defendant company did authorize the acceptance of a bonus in excess of legal interest, but that at such time it did not know that the acceptance of such a bonus was contrary to the law of New Mexico, and that so soon as it learned that it was contrary to the law it disaffirmed the same, you will find for the defendant.

Refused.

If the jury believe from the evidence, that the payment by plaintiff to Mr. Dinkel and Mr. Vincent, of the sum of $6,500, was not made as a subterfuge or bonus for the express purpose of violating the usury laws of this Territory, then the jury should find for the defendant.

Refused.

The jury are instructed, that if they believe from the evidence, that the $6,500, paid by plaintiff to Dinkel and Vincent, was paid for services rendered by them, or either of them, to him, and that such payment was a just and reasonable compensation for such services, then the jury should find for the defendant.

Refused.

The jury are instructed that under the usury laws of the Territory of New Mexico, it is no offense for the borrower to pay any sum, as a bonus for the securing of a loan, and that such payment

may legally be made to any person whatever. The payment
201 of such bonus or sum of money only becomes illegal when such payment is made for the express purpose of securing, and as a subterfuge to secure and receive, more than the twelve per cent. interest allowed by law; and before you can find the defendant guilty, you must find first, that the defendant did receive such bonus or payment, and second, that such bonus and payment was so received as a subterfuge to enable such party to receive more than the legal rate of interest in this Territory.

Refused.

The jury are instructed, that if they find from the evidence, that the payment of $6,500 was made to Mr. Dinkel and Mr. Vincent, and that such payment was made for — on behalf of the defendant company, and that the amount so paid was more than a reasonable and just compensation for the services rendered, but that some less sum than $6,500, was the true value of the services so rendered as aforesaid, then the jury are instructed that they may fix the value of such services, and that in no event could the jury find for the plaintiff in any greater sum than double the difference between the amount paid, and the amount justly due as compensation for such services.

Refused.

The jury are instructed, that if you find from the evidence, that the sum of $6,500 was paid by plaintiff, to any agent of the defendant company, and that said agent or agents, had rendered services to McBroom in procuring the loan for him, and that said services were worth less than the amount so paid, you will deduct the value of such services from the sum of $6,500, and in no event can you find a verdict in favor of the plaintiff for a larger sum than twice the difference between the sum of $6,500 and the value of the services rendered.

Refused.

If you find from the evidence, that the plaintiff, at the be-
202 ginning of this suit, had not paid defendant the principal sum due, out of which the usury is alleged to have arisen, but was at the commencement of this suit, still owing the defendant the sixty-five thousand dollars principal borrowed, or any portion thereof, in excess of the amount alleged to have been paid by plaintiff to defendant, then your verdict should be for defendant.

Refused.

The jury are instructed that in order to complete the offense of usury it is necessary that the principal sum due, and legal interest, and something more than legal interest, shall have been paid by the borrower, otherwise there can be no usury; and if in this case you find from the evidence, that after crediting upon the $65,000 borrowed by plaintiff of defendant, and legal interest thereon, all sums paid by McBroom to defendant, any balance then remains due

to defendant from McBroom, then your verdict must be for the defendant.

Refused.

Though you may believe from the evidence that Dinkel, the agent of the defendant company, was instructed by the defendant company to enter into a contract taking a bonus for the use and benefit of the defendant company, yet, if you believe from the evidence, that Dinkel did not enter into a contract to receive a bonus for the benefit of said company, but did enter into a contract with plaintiff McBroom, to receive, and did receive a bonus for the use of himself, and any party but the defendant company, then your verdict should be for the defendant; because the making of a contract for the receipt of a bonus for himself from the plaintiff, would not then be such a contract as his principal had instructed him to make, and the principal would not be bound by such a contract, when such contract contemplated a violation of law.

Refused.

The jury are instructed that though they may believe from
203 the evidence, that the defendant company instructed Mr. Dinkel to make the loan of $65,000 to the plaintiff, and to receive for and on behalf of the company, the best bonus possible, yet if they believe from the evidence, that Dinkel did not pursue strictly the instructions so given to him by the defendant company, but instead made the loan, reserving a bonus or compensation for himself and Mr. Vincent, then the jury are instructed that their verdict should be for the defendant.

Refused.

The jury are instructed that though they may believe from the evidence, that the defendant company authorized Mr. Dinkel, to make the loan mentioned to McBroom, and secure from McBroom the best possible bonus, in addition to legal interest, yet if they also believe that such instructions from the defendant company, were based upon previous instructions given by said company to Mr. Dinkel, not to make any loans, or do any act in violation of the laws of the Territory of New Mexico, then the jury are instructed that, as a matter of law, the two instructions should be taken together, and should be regarded as a direction on the part of the defendant company to Mr. Dinkel, to make the loan and receive a bonus from Mr. McBroom, if the receipt of such bonus was a legal and lawful act, under the laws of the Territory of New Mexico, and not otherwise; and if the jury believe from the evidence, that such instructions and directions were given by the defendant company to Mr. Dinkel, then you are instructed that the defendant company could not be held liable for the taking of any bonus or compensation, in excess of the legal interest, from McBroom, in the transaction and loan in evidence in this cause.

Refused.

The jury are instructed that a letter introduced from Colin J. MacKensie, offered in evidence in this cause cannot be considered as binding upon the defendant company, unless it appears
204 by the evidence that he, by such letter, was then and there acting for and on behalf of said defendant company, and further, that he was authorized by the defendant company to write such letter.

Refused.

The jury are instructed that a corporation acts by its agents, but the agent of a corporation may act either as an agent of the corporation, in which event there must be some proof to show that he did so act, or he may act as an individual only, and his individual acts, as an individual, cannot bind the corporation.

Refused.

The jury are further instructed that unless you find from the evidence, that the particular transaction as proven by the evidence, was authorized by the defendant company, or that the defendant company subsequently ratified said transaction, then you will find the defendant not guilty.

Refused.

You are instructed that under the usury laws of this Territory, the borrower who has paid to the lender more than legal interest, may recover double the amount of such illegal interest so paid, in an action of this character upon proper proof, but the sum of which such recovery may be had, is not double the total interest paid, but double the excess of the legal rate of twelve per cent. per annum so paid.

All these instructions were asked for in time, and refused, and exceptions taken, and are entitled to go into a bill of exceptions should the same be necessary.

JAMES O'BRIEN, *Judge.*

205 Which contains all the evidence introduced or offered by either party upon the trial of said cause, together with the objections made to certain portions thereof, the rulings of the court thereon, and the exceptions taken at the time, and also the instructions given and refused by the court, and the exceptions taken thereto at the time.

And because the foregoing matters are not all of record in said cause, the said defendant prays that this its bill of exceptions containing the same may be signed, sealed and made a part of the record therein, which is accordingly done this 6th day of February, A. D., 1892.

JAMES O'BRIEN,
Chief Justice, etc.

Stipulation.

It is hereby stipulated and agreed that the foregoing proposed record and bill of exceptions may be settled, signed and sealed by the judge of said court as the record on which the judgment in said cause may be reviewed by the supreme court, without further notice; and time for proposing amendments thereto, or for settling and signing said record and proposed exceptions is waived.

It is further agreed that the companies' acts, under which defendant company was incorporated, and which were introduced in evidence on the part of the plaintiff, need not be inserted in the bill of exceptions, but it is admitted for the purpose of the hearing of this cause in the supreme court, that the defendant company was duly incorporated under said "companies' acts" and was thereby authorized to conduct the business set forth in its articles of incorporation, and that a copy of said "companies' acts" were duly filed in the office of the probate clerk and *ex officio* recorder for San Miguel county, in pursuance of the statute authorizing foreign corporations to do business in this Territory. And it is further agreed
206 that the portions of exhibits which are not set forth in full in the above bill of exceptions are not material to either party in this case, and that the above bill of exceptions contains all of the evidence which is material to either party in the case. And it is agreed that the portions of exhibits set forth in the bill of exceptions may be considered in all respects as if the entire exhibits were set forth therein.

FRANK SPRINGER,
Attorney for Plaintiff.
A. A. JONES,
Attorney for Defendant.

Upon the foregoing stipulation the foregoing record and bill of exceptions are settled, signed and sealed as those upon which said cause may be heard in the supreme court, and the time for settling, signing and filing the bill of exceptions in the above-entitled cause is hereby extended until the 15th day of March, A. D., 1892.

JAMES O'BRIEN,
Chief Justice, etc.

District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

WILLIAM H. MCBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED). } No. 3486.

It is hereby stipulated and agreed by and between the plaintiff and defendant in the foregoing cause, that the time for settling, signing, sealing and filing of the bill of exceptions in said cause, for the purpose of having said cause reviewed by the supreme court of the

Territory of New Mexico, and the time for filing the transcript of the record and the bill of exceptions in the foregoing cause in the supreme court of the Territory of New Mexico, and the time for filing an assignment of errors and briefs in said cause in said
207 supreme court may be and is hereby extended until the first day of July, A. D. 1892, and the said William H. McBroom does hereby consent that any order may be made or act done by said district court for the purpose of carrying into effect this stipulation. And any and all objections which can or might be raised by reason of said bill of exceptions not having been settled, signed and sealed within the time prescribed by the court, and any objections which can or might be made by reason of said transcript of record and bill of exceptions and assignment of errors and briefs not having been filed and served within the time ordered by the court are hereby waived, and no objections will be made, either in the district court or the supreme court in reference thereto by the said William H. McBroom or his attorney.

FRANK SPRINGER,
Attorney for Plaintiff.
A. A. JONES,
Attorney for Defendant.

Las Vegas, N. M., April 13th, 1892.

District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED). } No. 3486.

By consent of the parties to the foregoing cause, and each entering a general appearance for that purpose: It is ordered and adjudged by the court that the time for filing and settling, signing, sealing and filing the bill of exceptions in the foregoing cause be and is hereby extended until the first day of July, A. D. 1892.

JAMES O'BRIEN,
Chief Justice, etc.

Las Vegas, N. M., April 22d, 1892.

208 District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

WILLIAM H. McBROOM
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEX. (LIMITED). } No. 3486.

Now come the parties to the above-entitled cause by their respective attorneys therein and file herein their stipulation in writing. And the court being now sufficiently advised in the premises, and in pursuance of said stipulation: It is ordered that the time for the

settling, signing, sealing and filing of the bill of exceptions and for the filing of the transcript of record, bill of exceptions, assignment of errors and briefs, in said stipulation mentioned, be, and the same is hereby extended to the first day of July, A. D. 1892.

JAMES O'BRIEN,
Chief Justice, etc.

Las Vegas, N. M., April 26th, 1892.

And because the foregoing matters are not all of record in said cause the said defendant prays that this its bill of exceptions containing the same may be signed, sealed and made a part of the record herein, which is accordingly done this 26th day of April, A. D. 1892.

JAMES O'BRIEN,
Chief Justice, etc.

209 TERRITORY OF NEW MEXICO, }
County of San Miguel. }

I, Miguel A. Otero, clerk of the fourth judicial district court for the Territory of New Mexico, sitting in and for the county of San Miguel, do hereby certify that the above and foregoing contains a true and perfect transcript of the record and proceedings, papers and bill of exceptions as signed by the judge of said court, in the cause lately pending in said court, wherein William H. McBroom was plaintiff, and The Scottish Mortgage and Land Investment Company of New Mexico, (Limited), was defendant, as the same remain of record and on file in my office.

Witness my hand and the seal of said court this 26th day of April, A. D. 1892.

[SEAL.] M. A. OTERO, *Clerk.*

210 And afterwards, to wit, on the 29th day of June, 1892, there was filed in the office of said clerk an assignment of errors in said cause; which said assignment is in the words and figures following, to wit:

Assignment of Errors.

In the Supreme Court for the Territory of New Mexico, July Term A. D. 1892.

THE SCOTTISH MORTGAGE AND LAND INVESTMENT CO. OF NEW MEXICO (LIMITED), Plaintiff in Error,
vs.
WILLIAM H. McBROOM, Defendant in Error.

Now comes the plaintiff in error in the above-entitled cause and assigns as errors committed by the court below the following, to wit:

1st. That the said court below admitted to the jury on the trial of said cause, testimony and documents and papers as evidence and proof on behalf of the said defendant in error and plaintiff below, over the objections of the said plaintiff in error and defendant

below, which said testimony, documents and papers then and there were not material, competent or proper evidence or proof in said cause.

2nd. That said court below refused to admit to the jury in said cause upon the trial of said cause in said court, legal and proper evidence and proof then and there offered by plaintiff in error and defendant below, in its behalf.

3rd. That the court below erred in refusing at the close of
211 the case for plaintiff below, to instruct the jury in said cause to find for the plaintiff in error and defendant below, as moved by said defendant below.

4th. That no evidence was offered or admitted in said cause in behalf of said plaintiff below upon which the verdict of the jury in said cause could lawfully have been returned by the jury in said cause or judgment thereon entered by said court below.

5th. That it was established and admitted in said cause upon the trial thereof, without denial, that neither principal nor legal interest due on the loan out of which the alleged cause of action was alleged to have accrued in said suit, had been paid and that the same was due and payable, at the date of the commencement of said action, by said plaintiff below to said defendant below.

6th. That it appeared upon the trial of said cause, uncontradicted, that at the date of said trial and judgment the said plaintiff below had no legal interest in said cause.

7th. That the court below erred in not directing a verdict for defendant below.

8th. That the court below erred in overruling the motion of defendant below for a judgment in its favor upon the special findings of the jury in said cause, notwithstanding the general verdict of said jury for said plaintiff below.

9th. That the court below erred in entering judgment below in favor of the said plaintiff below and against the said defendant below.

212 10th. That the court below erred in overruling the motions of defendant below for a new trial and in arrest of judgment.

11th. That the judgment entered below was excessive and greater than was legally warranted by any proof in said cause.

12th. That the court below erred in giving to the jury in said cause on the trial thereof each and all of the instructions then and there given by the court of its own motion and asked for by said plaintiff below and also erred in refusing to give each and every of the instructions requested by the defendant below and refused by said court below.

13th. That the court below erred in charging (Record, folio 746) that the measure of damages in said cause was double the amount of the excess charged or paid over the legal rate of interest and also (Record, folios 775, 776, 777, 778 and 779) that the measure of damages in said cause was double the whole interest alleged to have been paid by plaintiff below.

14th. That the court below erred in refusing to instruct the jury as requested by the said defendant below (Record, folio 815) that

the measure of damages in this cause was double the excess of any interest paid in excess of legal interest and not double the total sum of the interest alleged to have been paid.

15th. That the court below erred in refusing to instruct the jury, as requested by the said defendant below (Record, folios 304, 305 and 306) that to complete the offence of usury in said cause the proof therein must show that, at the date of the commence-
213 ment of said action, the said plaintiff below must have paid all principal and legal interest due and an excess over such principal and legal interest.

16th. That the court below erred in commenting upon the evidence in said cause in his charge to the jury in said cause.

A. A. JONES,
EUGENE A. FISKE,
Attorneys for Plaintiff in Error.

214 And afterwards, to wit, on the 28th day of July, 1892, there was filed in the office of said clerk a joinder in error in said cause; which said joinder in error is in the words and figures following, to wit:

In the Supreme Court, July Term, 1892.

THE SCOTTISH MORTGAGE & LAND INVESTMENT COMPANY
vs.
WM. H. MCBROOM.

Now comes the defendant in error, by his counsel, and says that there is no error in the record in said cause; wherefore he prays that the judgment therein be affirmed with costs.

FRANK SPRINGER,
Counsel for Def't in Error.

215 And afterwards, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the last Monday of July, A. D. 1892, the same being Monday, July 25, 1892, on the fifth day of said term, the same being Friday, July 29, 1892, the following, among other, proceedings were had, to wit:

THE SCOTTISH MORTGAGE AND LAND Investment Company of New Mexico (Limited), Pl'ff in Error, *vs.* WILLIAM H. MCBROOM, Def't in Error.	472.	Error to San Miguel County.

This cause coming on for hearing upon the transcript of record, assignment of errors, and briefs of counsel filed herein, is argued by Messrs. Jones and Fiske, for plaintiff in error, and by Frank Springer, Esq., for defendant in error, and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, at the term of said supreme court last aforesaid, on the twenty-seventh day thereof, the same being Wednesday, August 24, 1892, the following, among other, proceedings were had, to wit:

THE SCOTTISH MORTGAGE AND LAND Investment Company of New Mexico (Limited), Pl'ff in Error, *vs.* WILLIAM H. McBROOM, Def't in Error.	472.	Error to San Miguel County.

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Freeman, Associate Justices Seeds, Lee, and McFie concurring, reversing the judgment of the court below for reasons stated in the opinion of the court, on file. It is therefore considered and adjudged by the court that the judgment in this cause of the district court in and for the county of San Miguel, whence this cause came into this court, be, and the same hereby is, reversed, and that this cause be, and the same hereby is, remanded to said district court, with directions to proceed in accordance with the views expressed in the opinion of this court; and it is further considered and adjudged that said defendant in error pay all costs in this behalf expended, to be taxed, and that execution issue therefor.

216 And afterwards, to wit, on the 23rd day of November, 1892, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a petition for a rehearing of said cause; which said petition is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, at the July Term, 1892.

THE SCOTTISH MORTGAGE AND LAND INVESTMENT Company of New Mexico, Limited, Plaintiff in Error, *vs.* WILLIAM H. McBROOM, Defendant in Error.	Error to the Fourth District Court for San Miguel County.

Petition for Rehearing.

The defendant in error respectfully prays the court to allow a rehearing of this cause, and to reconsider the opinion and decision handed down during the present term, reversing the judgment of the district court, upon the grounds stated in the brief filed herewith.

FRANK SPRINGER,
Counsel for Defendant in Error.

Brief in Support of Petition.

The unusual number of cases argued in rapid succession at this term, and crowded upon the court for decision within a very limited and wholly insufficient time, had the effect, in the opinion of both bench and bar, of preventing a full consideration of all
217 the cases submitted. It is no reflection upon the court, but is believed to coincide with the opinions of the judges, to say that this case was one of those unsatisfactorily considered for the above reason. In addition to this, one of our most important authorities, on which we confidently relied—the latest decision of the U. S. Supreme Court—although referred to upon the oral argument and cited on the margin of the brief, was not before the court when considering its opinion, on account of the disappearance of the volume containing it, and our inability to procure another in time for use. These facts, coupled with a sincere belief that upon a re-examination of authorities not alluded to in the opinion, the court may reach a different conclusion, have induced me, for the first time in my practice before this court, to ask for a rehearing.

I.

It is respectfully urged that in holding, as the opinion does, that the right of action for the penalty of double the usury does not accrue until after the entire principal debt is paid, the court does not sufficiently consider the reasons existing in this case why the doctrine of *locus penitentiæ* does not apply. That doctrine is only invoked where the court thinks there may be a doubt as to the intention of the lender in the matter of usury. But here all possible doubt as to such intention was removed by the acts of the lender itself. The Scotch company, after considering the advisability of crediting the usurious bonus of $6,500, decided not to do so, upon obtaining indemnity against this very suit. They collected the first interest note in cash, Dec. 31, 1886, without applying any part of the bonus in reduction of it. In March, 1887, they
218 took new mortgage security, upon additional property, for all the remaining interest notes, representing all the interest to accrue up to the maturity of the principal, without any deduction on account of the bonus. They failed to credit the bonus upon the debt at any time before this suit was brought; and at no time in this suit, or upon the trial, have they offered to apply it to the payment of principal or interest. On the contrary, they have, pending the suit, sold out the entire mortgaged property for the debt, without any deduction of the bonus; thus conclusively showing their intention not to repent, but to exact payment to the uttermost farthing. None of the cases in which the doctrine of *locus penitentiæ* was admitted contained any such facts as these. They are not alluded to in the opinion, and this fact leads counsel to think that for lack of time they were overlooked; whereas they are believed by counsel to be of controlling importance.

The opinion, both on this point and the other one hereafter dis-

cussed, is based largely upon the language of certain decisions under the national banking act. This differs so radically from the New Mexico statute under which this action is brought, that I ask the court to again consider whether these decisions can possibly be applicable.

Under sec. 1737 and 1738, (C. L. N. M.) quoted in full on page 9 of my original brief, the cause of action which the facts of this case disclose is expressly declared to accrue as to any person, &c., who may "charge, receive or collect a higher rate of interest than 12 per cent. per annum, by means of discount, commission, agency, or any other subterfuge." There is nothing at all comparable to this in the national banking act; under which an action arises
219 only "in case the greater rate of interest has been paid." (Rev. Stat. U. S., sec. 5193.)

The court in its learned opinion refers at length to the English case of Loyd *vs.* Williams, 3 Wils. 261, decided upon a statute which the opinion declares to be "very similar in terms to our own;"—which holds that the cause of action accrued immediately upon the receipt of the usurious interest, and that the statute of limitations begins to run then, and not upon the payment of the principal debt. But the opinion then states that this case, which it says "became the leading authority for that construction, both in this country and in England," has not been adhered to by the English courts;—and cites the case of Scurry *vs.* Freeman, 2 Bos. & Pull., 381, decided April 23, 1801, as overruling it. I submit, with the greatest deference, that the course of English adjudication is otherwise:

As late as 1830, in the case of Wood *vs.* Grimwood, 10 Barn. & Cressw., 698 (21 Eng. Com. Law Rep. 291), the doctrine decided in Loyd *vs.* Williams, and followed in Wade *vs.* Wilson, 1 East., 195, was emphatically reaffirmed. There a loan was made Sept. 9, 1826, payable in one year, with interest stipulated at the lawful rate, payable half yearly. By means of a subterfuge, a bonus or premium in addition to the interest, was exacted and paid. In April, 1827, the half year's interest was paid; and at the end of the year the remaining interest and the principal debt was paid. Suit was brought in June, 1828, to recover the statutory penalty;—more than one year after payment of the half year's interest in April, but less than one year after payment of the principal in October, 1827. The court held that the offense was complete when the first half-yearly installment of interest was received in addition to the
220 premium;—and the action was therefore barred. Lord Tenterden, C. J., and all the other judges, concurred in this opinion. The case of Scurry *vs.* Freeman, *supra*, was cited, and the court held that it established nothing to the contrary;—Bailey, J., remarking: "Scurry *vs.* Freeman may be right, and undoubtedly would be right, provided the lender of the money (500l) after the 50l was retained, had claimed 450l as the debt."

That is precisely the reasoning which governs the case at bar. The loan of $65,000 might, after the payment of the $6,500 bonus, be treated as a loan of only $58,500;—were it not for the fact that the Scotch company expressly declined to do so by crediting the

bonus; took new security afterwards for interest on $65,000 for the whole period of the loan; and ultimately sold out all the mortgaged property without ever giving credit for any part of the bonus in reduction of the debt;—thus to the very last, and to this day so far as the record shows, claiming the debt to be $65,000—and not $58,500.

II.

If, under the statute, a contract made in violation of the usury law is void, it is conceded that the doctrine of *locus penitentiæ* does not apply;—for there would be no legal portion of the debt. The opinion holds that such is not the effect of usury.

This view is based, as I have already said, upon decisions under the national banking act. (Rev. Stat., 5198.) I invite the attention of the court to the absolute difference, in language, principle and intent, between that act and the New Mexico law under which this suit is brought.

The United States law does not prohibit the charging of
221 usury, nor impose a penalty for so doing. It simply defines what the legal rate is; declares that if more is charged the interest shall be forfeited (*i. e.* no interest can be recovered); and in case more is paid twice the amount may be recovered back. It does not say: "You shall not charge usury." It only says: "You take your chances; if you charge usury you cannot collect interest; and if you receive usury, you are liable to pay back double."

Not so the New Mexico law: By it, the charging of usury is made a misdemeanor, punishable by fine; it is made absolutely unlawful; there is no choice or option about it. The law says: "You shall not charge usury; you become a criminal if you do; and besides this, if you receive usury you are liable to pay back double." Now there may be cases in which the latter contingency never arises. The borrower, whom misfortune has driven to make a usurious loan, has paid no money; and therefore there is nothing to be recovered back, and the part of the statute authorizing such an action would cut no figure. The question would then arise, Can the lender obtain the aid of a court of justice to enforce a contract which the law has expressly prohibited? No such question arose, or could arise, in the national bank cases. But the Supreme Court of the United States has expressly passed upon this question in other cases, and settled it absolutely. I believe an examination of these cases, which are not referred to in the opinion, will change the conclusion of the court.

In Tiffany *vs.* Boatman's Institution, 18 Wallace, 384, this identical question arose in a usury case, and the Supreme Court announced its own settled doctrine, irrespective of the decisions of other courts, as follows:

"The defendant is by its charter authorized to lend money
222 on interest, but is forbidden to exact more than 8 per cent. for the loan. No penalty is prescribed for transgressing the law, nor does the charter declare what effect shall be given to the usurious contract. The effect must, therefore, be determined by the

general rules of law. The modern decisions in this country are not uniform on the question whether, if the bank take more than the rate prescribed, the contract shall be avoided or not on these general rules; nor is this a matter of surprise if we consider the growing inclination to construe usury as not to destroy the contract. It is, however, unnecessary to review these cases, or the earlier ones in England and this country, which uniformly hold that the contract is avoided, because this court has in the case of The Bank of the United States *vs.* Owens, 2 Peters, 527, decided the question. The bank in that case brought suit upon a promissory note that was discounted at a higher rate of interest than 6 per cent., which was the limit allowed by its charter upon its loans or discounts. The charter, like that of the Boatman's institution, did not declare void any contract transcending the prescribed limits, nor affix any penalty for the violation of the law. It was contended in that case as it has been in this, that a mere prohibition to take more than a given per cent. does not avoid a contract reserving a greater rate, and that when a contract is avoided, it is always in consequence of an express provision to that effect. But the court held otherwise, and decided that such contracts are void in law upon general principles; that there can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is illegal. Chief Justice Taney, in the Maryland circuit, as late as 1854, in a similar case, held similar views, and supported them by the decision in this case. Dill *vs.* Ellicott, Taney's Circuit Court Decisions, 253. It must, therefore, be accepted as the doctrine of this court, that a contract to do an act forbidden by law is void, and cannot be enforced in a court of justice."

That was in 1873. In 1891 the question came up again in a case analogous in principle, but with the very important addition that here a distinct penalty was prescribed for violation of the law:—thus supplying the element wanting in the former case. This was the case of Miller *vs.* Ammon, 145 U. S., 421:—which was cited
223 on the argument from a periodical which could not afterwards be found—the official report not having then been issued.

In this case, an ordinance prohibited the sale of liquor without a license, "under a penalty of not less than $50, nor more than $200 for each offense." The question was: Could a person selling liquor without such license recover the price of the goods upon the contract? The law provided a distinct penalty for its violation; but was silent as to whether contracts made contrary to its provisions should be void or valid. That is the case at bar precisely; only the reasoning of the court will apply with greater force to our case than to that. There the law did not prohibit the selling of liquor absolutely, but only the selling of it without a license from the city, for which $250 was charged. The purpose of the law was evidently not to suppress the sale of liquor, but to make it a source of revenue to the city. It only said: "You shall not do this except in a certain way." The purpose of the New Mexico law was to suppress the charging of usury. No matter what expressions of courts or

commentators may be found in favor of mitigating the harshness of usury laws, there cannot be the slightest doubt as to the design of the New Mexico legislature in dealing with this subject. It treated the exaction of usury as a public evil, and undertook to suppress it, just as it did the gambling tables. It did not license usury; it did not provide any means by which it could be lawfully charged. It prohibited usury absolutely. It said: "You shall not do this thing at all." Therefore the court cannot fail to see with how much stronger reason the decision in Miller *vs.* Ammon applies to our case. I quote from the opinion as delivered by Mr. Justice Brewer:

224 Two questions are presented: first, is the ordinance valid? Second, if so, can the plaintiff recover for liquor sold in violation of its terms? (p. 422–'3). * * * Passing to the other (second) question, that must be answered in the negative. The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. Pollock's Principles of Contracts, pp. 253 to 260; Perrin *vs.* Bornman, 102 Ill., 523; Alexander *v.* O'Donnell, 32 Kans., 608; Gunter *v.* Leckey, 30 Alabama, 591; Kennedy *v.* Cochrane, 65 Maine, 594; Bank of the United States *v.* Owens, 2 Pet. 527, 539; Pangborn *v.* Westlake, 36 Iowa, 546, 549; Harris *v.* Runnells, 12 How. 79, 84. In Bank *v.* Owens, this court said: "There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." There are some exceptions to this general rule, and the last two cases furnish instances thereof. These exceptions are based upon a supposed intent of the legislature. In Pangborn *v.* Westlake, it was thus stated how the exception should be determined: "We are, therefore, brought to the true test, which is, that while as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly." And in Harris *v.* Runnels, this court, after noticing some fluctuations in the course of decision, and observing "that we have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether the makers of it meant that a contract in contravention of it should be void, or that it was not to be so," added: "It is true that a statute, containing a prohibition and a penalty, makes the act unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from
225 which the contrary can be properly inferred, a contract in contravention of it is void."

"In the light of these authorities the solution of the present question is not difficult. By the ordinance, a sale without a license is prohibited under penalty. There is in its language nothing which indicates an intent to limit its scope to the exaction of a penalty, or to grant that a sale may be lawful between the parties, though unlawful as against its prohibitions; nor when we consider the subject-matter of the legislation, is there anything to justify a presumed intent on the part of the law-makers to relieve the wrong-doer from the ordinary consequences of a forbidden act. By common consent the liquor traffic is freighted with peril to the general welfare, and the necessity of careful regulation is universally conceded. Compliance with those regulations by all engaging in the traffic is imperative; and it cannot be presumed, in the absence of express language, that the law-makers intended that contracts forbidden by the regulations should be as valid as though there were no such regulations, and that disobedience should be attended with no other consequence than the liability to the penalty. There is, therefore, nothing in the language of the ordinance or the subject-matter of the regulations, which excepts this case from the ordinary rule that an act done in disobedience to the law creates no right of action which a court of justice will enforce."

It is perfectly clear from this decision, that where exceptions to the general rule are to be read into the statute, they must be founded on something in the statute itself to indicate a legislative intent to make such an exception. It is not from the silence of the statute that such an intent is to be inferred. Nor is there anything in the subject-matter of the statute, which deals with a thing prohibited without qualification, and made a misdemeanor under all circumstances and in all shapes, to indicate an intention of the legislature to look with complacency upon the violation of it, any more than in the numerous other cases where acts not *mala in se* have been visited with penalties and prohibitions as offenses against public policy. I cannot suppose that if the court had had
226 this decision before it, it would have adopted the view summed up in one of the concluding sentences of its learned opinion: "If the legislature had intended to forfeit the entire debt, or to render the transaction void, nothing could have been easier than to have so declared."

Would it not have been a stronger view to say: "If it had been the intention of the legislature that the elementary rules of law should not apply to the construction of this statute, and that contracts made in violation of its prohibitions should nevertheless be valid, nothing could have been easier than to so declare?"

Such was the fact as to the first usury law of this Territory, the act of Jan. 2, 1852;—which provided that any one charging over 12 per cent. should forfeit the whole interest, "and shall only be entitled to recover the debt due without any rate of interest whatever." (Comp. Laws, 1865, 594.) In very many States, where the legislatures intended to save the contract for the principal debt from avoidance under the usury laws, they have expressly so declared. This is the case in Alabama, Dakota, District of Columbia, Indiana, Kentucky,

Michigan, Missouri, Nebraska, New Hampshire, New Jersey, South Carolina, Tennessee, Texas, Virginia, West Virginia. Hence it is entirely legitimate to argue that if the New Mexico legislature had intended that a contract made in violation of one of its laws should, contrary to the general rule on that subject, be valid in whole or in part, it would have said so, as was done in those States.

I desire to suggest also for consideration the difficulties which defendant in error will encounter in ascertaining his legal rights, if this decision should be adhered to. The case, under the
227 present order, is reversed and remanded to the lower court. There McBroom must do one of two things:—either go through the forms of a trial and have an adverse judgment entered in conformity with this opinion, then come to this court again by writ of error to get a judgment from which he can appeal to the U. S. Supreme Court; or, he must dismiss this suit, and bring another within three years from the foreclosure of the mortgages; to which the Scotch company will plead the statute of limitations on the ground that the cause of action accrued when the first interest was paid—thus taking the same position we occupy now. This would of course be decided against them by the territorial courts; but if the Supreme Court of the United States should then hold the other way, McBroom's remedy would be wholly lost, through no fault of his.

If, notwithstanding all the foregoing considerations, the court should adhere to its opinion adverse to defendant in error, then I ask the court to render a final judgment against him now (as it has the power to do under section 2190 Comp. Laws) which can be appealed from. It would be a hardship to require defendant in error to go through the idle form and great expense of another trial below, and an appeal to this court, to enable him to obtain a review of the present decision of this court on the vital question of the whole litigation.

Respectfully submitted,

FRANK SPRINGER,
Counsel for Defendant in Error.

228 And afterwards, at the regular term of said supreme court last aforesaid, on the twenty-eighth day thereof, the same being Monday, January 2, 1893, the following, among other, proceedings were had, to wit:

THE SCOTTISH MORTGAGE AND LAND INVESTMENT Company of New Mexico (Limited), Pl'ff in Error, *vs.* WILLIAM H. McBROOM, Def't in Error.	472.	Error to District Court of San Miguel County.

Now comes the said defendant in error, by his attorney, Frank Springer, Esquire, and moves the court to grant a rehearing of this cause, and the said plaintiff in error comes, by its attorneys, A. A. Jones and Eugene A. Fiske, and moves the court to strike said

motion from the files, and the court, not being sufficiently advised in the premises, takes said motion under advisement.

And afterwards, at the regular term of said supreme court last aforesaid, on the thirty-fifth day of said term, the same being Tuesday, February 28, 1893, the following, among other, proceedings were had, to wit:

THE SCOTTISH MORTGAGE AND LAND INVESTMENT Co. of New Mexico (Limited), Pl'ff in Error, *vs.* WILLIAM H. McBROOM, Def't in Error.	472.	Error to District Court of San Miguel County.

The court having considered the motion for a rehearing in the above-entitled cause and being fully advised in the premises, it is considered and adjudged that said motion be and the same is denied and overruled, and, at the request of the said defendant in error that in case this court should adhere to its opinion filed and judgment heretofore entered in this cause that then this court would, for the purpose of facilitating an appeal of this cause by said defendant in error to the Supreme Court of the United States, modify its judgment in this cause heretofore entered in this court reversing and remanding said cause and would instead thereof enter a final judgment in this court against said defendant in error, it is further considered, after an examination of the record in said cause, that the judgment heretofore entered in said cause be, and the same is hereby, so modified that *venire de novo* be not awarded in said cause, and upon the facts contained in said record, it is considered by the court that the said plaintiff in error as to the matters complained against it go hence without day and that it have and recover of and from the said defendant in error its costs laid out and expended in this court, as well as in the district court, and have execution therefor.

229 And heretofore, to wit, on the 24th day of August, 1892, there was filed in the office of said clerk an opinion of the court in said cause; which said opinion is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico.

SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY (LIMITED) *vs.* W. H. McBROOM.

This is a writ of error brought to reverse a judgment rendered in favor of the defendant in error and against the plaintiff in error in the district court for the fourth judicial district for the county of San Miguel.

The facts are substantially as follows: On the 23rd of June, 1883, the Scottish Mortgage & Land Investment Company of New Mexico,

Limited, a corporation organized under the laws of Scotland, filed in the office of the probate clerk of San Miguel county, New Mexico, its certificate of incorporation and articles of association and a certificate designating Las Vegas as its principal place of business in New Mexico and George J. Dinkel as its authorized agent, pursuant to the laws of the Territory allowing foreign corporations to do business here. By articles of association it appears that the principal object of this company was the investment of money on loan on the security of real or heritable or other property in the United States. The directors were empowered to appoint managers and other necessary officers. Previous to filing these papers, the company entered into a contract with George J. Dinkel, appointing him and one Browning local managers of the company. Article 4th provided that "all commissions on loans by the company and all bonuses or penalties payable by borrowers from them in respect of such loans shall belong to the company." The general manager of the company was to have general charge of the company's business in New Mexico. On the 5th of February, 1886, the defendant in error made application to the company, through Dinkel, its general manager, for a loan of sixty-five thousand dollars, to be secured by mortgage, and this offer was transmitted to the home office for instruction. The application was at first refused for the reason that the amount was too large. On July 14th of the same year Dinkel again wrote to Carson and Watson, the general managers at Glasgow, the home office, stating that McBroom had renewed his application for loan, first proposing to pay a commission of six thousand dollars for securing the loan and afterwards to give Dinkel a
230 fourth interest in his entire ranch and stock, which interest Dinkel then estimated to be worth fifty thousand dollars. In his letter transmitting this offer to the home company, Dinkel said:

"Now, such a proposition comes only once in a very great while, and I was anxious that the company should receive the benefit of this great commission, which would be in addition to the ten per cent. interest he proposed to pay."

A directors' meeting was held at the home office to consider this proposition and it was also declined. On the same day, however, the president of the company wrote Dinkel, giving a full account of the meeting, saying:

"In regard to the McBroom business, I very strongly urged on my colleagues that if we could get here the parties whom you have already interested to stand aside we might give him the whole $65,000.00 at twelve per cent., and in that event, perhaps, McB. might still consider you entitled to a commission, &c."

On September 4th Dinkel cabled to the home office that McBroom had backed out, but later on, negotiations having been renewed, Dinkel cabled the home office as follows: "Will directors now loan McBroom $65,000, first year six per cent., after that ten per cent., with quarter interest?" To this telegram the board replied by cable as follows: "McBroom. The board sanction a loan of $30,000, first mortgage ten per cent., or $65,000, twelve per cent. Decline

quarter interest, but get best cash bonus possible instead, or get third party to buy quarter interest and pay us."

On the basis of this understanding the trade was consummated, the company advancing in checks, &c., to McBroom, the defendant in error, the sum of $65,000, and the defendant in error returning at the same time to Dinkel the bonus of $6,500.

This action was brought under the statute to recover double the amount of this bonus or commission. The action was brought under sections 1737 and 1738 of the Compiled Laws, which are as follows:

"SEC. 1737. Any person, persons, or corporation, who shall hereafter charge, collect, or receive from any person a higher rate of interest than twelve per cent. per annum, shall be guilty of a misdemeanor, and upon conviction thereof before the district court or a justice of the peace, shall be fined in a sum of not less than twenty-five dollars, nor more than one hundred dollars, and such person, persons, or corporation shall forfeit to the person of whom such interest was collected or received, or to his executors, administrators, or assigns double the amount so collected or received, upon any action brought for the recovery of the same within three years after such cause of action accrued.

"SEC. 1738. The provisions of this act shall also apply to any person, persons, corporation, or officer of the same, who may charge, receive, or collect a higher rate of interest than twelve per cent. per annum by means of discount, commission, agency, or any other subterfuge."

The first contention of the plaintiff in error is that the transactions out of which the cause of action arises were not tainted
231 with usury in a way to affect the rights of the company; that in order to constitute usury there must be an intention knowingly to contract for usurious interest, and that both parties must participate in this corrupt agreement; that there must be an *aggregatio mentium*. It insists that if there was usury in the transaction it was participated in alone by its agent, Dinkel. The record shows that the $6,500 claimed to be usurious was paid by defendant in error to Dinkel, the local manager of the company for New Mexico, for his services in procuring the loan. It is insisted, therefore, that the transaction falls within the rule laid down by the Supreme Court of the United States in the case of Call *vs.* Palmer, 116 U. S., 98, 6 Sup. Ct. Rep., 301, wherein that court say:

"It is settled that when an agent who is authorized by his principal to lend money for lawful interest exacts for his own benefit more than the lawful rate, without authority or knowledge of his principal, the loan is not thereby rendered usurious."

In reply to this contention the defendant in error insists, first, that the doctrine of agency has no application to the facts in this case; that Dinkel was not an agent, but an officer of the corporation; that a corporation can act alone through its officers and that a transaction with Dinkel was a transaction with the corporation itself; and, second, that the corporation knowingly participated in the usurious transaction by authorizing Dinkel, its local manager,

to get "the best cash bonus possible," and that it cannot protect itself from the consequences of its corrupt transaction by showing that it allowed its local manager to retain the fruits thereof.

In the view that we have taken of the matter it is immaterial to determine whether Dinkel was an agent or whether as an officer he was a part of the corporation, so that a transaction with him was a transaction with the corporation itself, for the fourth article of the agreement between him and the home office, *h*as already shown, provided that all such commissions and bonuses should *a*nure to the benefit of the company. In view of this provision of his contract and of the fact that the company had knowledge of each step taken by him it is to be presumed that he was acting for the company. The facts in this case bring it clearly within the rule laid down by the Supreme Court of the United States in the case of Fowler *vs.* Equitable Trust Co., 141 U. S., 384, wherein a foreign corporation (whose agent in the State accepted a commission from the borrower on loans procured from such foreign corporation) was held to have received the proceeds of the usurious transaction, the commission paid to the agent being in excess of the highest rate of interest allowed by law.

232 Nor does it afford any protection to this company to show that it was ignorant of the law of the Territory and was not therefore aware that the transaction was usurious and unlawful.

Lloyd *vs.* Scott, 4 Pet., 105.

Conceding, therefore, the correctness of the petition of the defendant in error that the transaction was with plaintiff in error, we are next to inquire into the legal effect of the contract as it relates to rights and liabilities of the contracting parties. The contention of the plaintiff in error is that while a party may be indicted under section 1737 as for a misdemeanor for charging an illegal rate of interest, in order to subject him to the penalty of a forfeiture he must have received it, the forfeiture being fixed at double the amount so collected or received. It insists also that "the amount so received" has reference only to the amount in excess of the legal rate; that is the usury. It insists also that as the $6,500 received by it or its agent were taken out of the loan made by it to defendant in error that it was not such a collecting or receiving as entitles defendant in error to maintain this action; that if A and B enter into a contract by the terms of which it is agreed that A shall lend to B one thousand dollars, in consideration of which B shall pay to A a bonus of one hundred dollars and execute to him his note for one thousand dollars, bearing the legal rate of interest, and in pursuance of the contract A lends to B the one thousand dollars and B hands back to A one hundred dollars and his note for one thousand, that the practical effect of the transaction is that B goes off with nine hundred dollars of A's money, while A retains B's note for one thousand dollars, and that the legal effect of the transaction is that the usury is contained in the note, and that A has not received usurious interest for the money actually advanced.

To the contrary is the position of the defendant in error, who insists that the penalty or forfeiture accrued when the usurious interest was charged and the amount of the forfeiture was fixed by the retention of the $6,500 out of the sum advanced by the plaintiff in error.

But few, if any, questions growing out of the law governing contracts have given rise to more discussion and resulted in less satisfactory adjudication than those involving the subject of usury. This contrariety of adjudication is the fruit of two opposing theories entertained as to the moral as contradistinguished from the legal character of usurious transactions, the theory of one class of
233 jurists and legislators being that the exaction of usury in an iniquity, and that therefore all laws passed for the suppression thereof should receive a liberal construction, while on the contrary it is insisted that while it is the province of the legislature to fix the rate of interest that may be contracted for and to make usurious contracts void that such contracts are not within themselves in contravention of good morals, are not *mala in se*, and that therefore the penalties imposed should be confined to the strict letter of the statute.

Guided by the first of these opposing theories many courts, both in this country and England, have held that, not only is the exaction of usury unlawful, but that it avoids every contract into which it enters, while other courts of equal weight and respectability have holden to the doctrine that no greater penalty should be imposed than is strictly within the words of the statute. It has been variously held that a statute which prohibits, under penalty, the exaction of more than the prescribed rate of interest makes the contract for the excess void, makes the contract for the entire interest void, makes the entire contract itself void.

We shall proceed now to inquire as to the construction heretofore given to statutes similar to that of ours, and particularly as to the time at which the cause of action accrued, for this is the principal question presented for our determination. In order to arrive at any satisfactory solution of this question it becomes necessary to trace minutely the history of legislation and judicial construction as applied to this question. Anciently at the common law any premium taken for the use of money was an offense. Such a premium was denominated usury, no such term as interest being known to the law. By the statute of III Henry 7th and 11 Henry LV all usury is damned and prohibited as being against the law of God and the laws of the realm and the law of nature. 3 Inst., 152.

The statute of 37 H. 8, c. 9, although entitled an act against usury, was the first English statute that undertook to make usury in a limited degree lawful. This statute was repealed by 5th and 6th Edward 6, but was re-enacted by 13 Elizabeth, c. 8. Various enactments followed until the year 1713, when an act very similar in terms to our own made all bonds and assurances of title void whereupon there should be reserved or taken more than ten per cent. per annum, and also gave a right of action for treble the
234 value of the money lent against the lender if he should re-

ceive or take more than five per cent. per annum. A case involving the construction of this statute came before the court of common pleas and is reported in 3 Wilson, at page 259. The question arose upon the statute which limited the right of action to one year from and after the commission of the offense. In that case, as in this, the usurious interest was retained by the lender out of the amount advanced on the loan—that is, was paid out of the borrowed money and a note executed for the entire amount. The note was afterwards paid. The action to recover the penalty was brought more than one year after the loan, but less than a year after the payment of the note. It was held that the offense was complete when the usurious interest was reserved or taken out of the money loaned, the lord chief justice observing:

"To constitute the offense for which the present action (an action of debt under the statute) is brought to recover treble the value of the money lent these three things must concur: First, a contract between the parties; second, moneys or other things lent; third, above five per cent. per annum received by the lender for the forbearance; and whenever these three matters concur, then the offense is committed. No time is mentioned with respect to payment of the principal money lent. The principal money may never be paid and yet the offense be committed."

The doctrine of this case was subsequently approved in the case of Wade *vs.* Wilson, 1 East., 199. The same doctrine has been announced at different times by quite a number of our State courts of last resort.

Kirkpatrick *vs.* Houston, 4 Watts & Serg., 115.
Grow *vs.* Albee, 19 Vt., 543.
Nelson *vs.* Cooley, 20 *ibid.*, 204.
Commonw. *vs.* Frist, 5 Mass., 53.
Sewell *vs.* Shomberger, 2 Mur. L. & E. (N. C.), 200.

These and many other cases that might be cited to the same effect hold that within the meaning of the statute, which defines the offense and limits the time within which an action may be brought to recover the penalty, the right of action accrues whenever any money is reserved or received by the lender which is intended at the time of such reservation or reception to be applied in the satisfaction of the usury. This construction cuts off entirely the *locus penitentiæ* and taints the transaction in its very inception. The reason for this construction is thus stated by the supreme court of Pennsylvania in the case of Kirkpatrick *vs.* Houston, *supra*, as follows:

"Any other interpretation of the act would put it in the power of the lender to stamp the character of guilt or innocence
235 on it at the precise point of time convenient for him to elude the prosecution by means of the limitation attached to it. Should the borrower sue at the receipt of the first payment he might be told that he was too soon. Should he wait until the whole was paid he might be told that the offense had been committed long before and that the year had gone by."

In this case, however, the learned chief justice (Gibson) uses a single expression that, in our opinion, militates strongly against the doctrine contained in the quotation just given and furnishes excellent grounds for reaching a different conclusion. He says:

"I will not say that the defendant might not lawfully receive *pro tanto* payment specially in discharge of what was lawfully due, for it is the corruption of taking and not the corruption of the contract which constituted the offense to which the penalty is annexed."

The doctrine of this case, therefore, fixes the liability of the lender absolutely by the receipt of any part of the usury as such, and henceforth there is for him no *locus penitentiæ*.

The same construction which gives a right of action under the statute just so soon as any portion of the usurious interest has been received, without regard to whether any portion of the sum advanced has been returned, as a rule treats such contracts void as to the whole transaction.

It is therefore insisted with much zeal and ability by the counsel for the defendant in error that there was no legal portion of the debt to which this usurious interest could be applied, and that therefore the doctrine of a *locus penitentiæ* has no application; that the legislature having provided a penalty for the exaction of usury any contract which embraces usury is void; that no right of action can arise out of a transaction which constitutes within itself a misdemeanor; that "there can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is itself illegal," thus invoking the application of the maxim, "*Ex turpi contractu non oritur actio.*" This proposition might be accepted as elementary were it not for the difficulties announced at the threshold of this opinion, arising out of the real nature of a usurious transaction.

236 Is the exaction of usury to be regarded at this time and under existing legislation as such an offense as to invoke the application of this maxim, with all of its attendant disabilities?

It sheds much light on the subject to note the fact that the tendency of more modern legislation and judicial determination of this question has been in the direction of mitigating the rigor of the common-law rule that treated all transactions tainted with usury as void and which also treated any exaction of usurious interest as an offense against as well the moral senses and the laws of God as against those of the realm.

The supreme court of Pennsylvania, which in 1842 decided the case of Kirkpatrick *vs.* Houston, 4 Watts & Sarg., *supra*, wherein it was held that "the receipt of money on account of an usurious contract is a consummation of the offense, from the consequences of which the party cannot relieve himself by subsequent release of the excess which was usurious," having a similar question before it in 1889, held as follows:

"The ruling complained of in the first specification of error was justified by the case of Brown *vs.* Bank, 72 Penn. St., 209, where it was held that 'it is actual payment on the foot of the usurious contract, either in part or in whole, which consummates the usury

and from which limitation of the action for the penalty commences to run.' If this were not so, and the usury is complete by merely including it in a renewal note, the penalty might be recovered without the payment of either principal or interest."

Kearney *vs.* First National Bank of Clarion, 18 Atl. Rep., 598.

So also in the State of Massachusetts we have already seen the doctrine held, in the case of Commonw. *vs.* Frost, decided in 1809, that the offense of usury is complete if more than the legal interest is paid at the time of the loan, whether the principal sum is ever refunded or not, and yet it has since been held by the same court that there can be no recovery of usury until the principal and legal interest have been paid; that up to the receipt of the last payment the lender has his *locus penitentiæ*.

Stevens *vs.* Lincoln, 7 Mete., 525.
Saunders *vs.* Lambert, 7 Gray, 484.

So also the doctrine laid down in the case of Neelson *vs.* Cooley, 20 Vt., 204, *supra*, decided at the October term, 1847, is in effect overruled by the same court in the case of Harvey *vs.* Nat'l Life Ins. Co., decided at the May term, 1888. 14 Atl. Rep., 7.

So also there has been by the English courts a marked modification of the doctrine, for while, as we have seen, *that* the rule laid down in the reign of George 3rd in the Lloyd *vs.* Williams case became the leading authority for that construction, both in England and in this country, the same court has since that time, in the case of Scrugg *vs.* Freeman, 2 B. & P., 381, decided April 23,
237 1801, held that in a transaction wherein five hundred pounds were handed to the borrower and by him fifty pounds were handed back to the lender there was in contemplation of law a loan of but four hundred and fifty pounds.

We think that the better rule is to treat the usurious transaction (or rather the transaction claimed to be tain-ed with usury) as valid to the extent of the principal sum and the legal interest, and to treat all payments made thereon, whether received as usury or as a bonus or commission *eo nomine*, as a reduction of the legal interest and principal.

This doctrine seems to have the support of the following authorities:

Kendall *vs.* Crouch, 88 Ky., 199.
11 S. W. Rep., 587 (cited in Neal *vs.* Rouse, 19 S. W. Rep., 141).

So also in the case of Kearney *vs.* First National Bank of Clarion, supreme court of Penn., tried October 28, 1889, reported in 18 Atl. Rep., the court cites with approval the case of Brown *vs.* Bank, 72 Penn. St., 209, already referred to.

The supreme court of Nebraska, in the case of Hall *vs.* First Nat'l Bank, reported page 150, 46 N. W. Rep., holds to the same doctrine, declaring that it would be a reproach upon the law to apply payments so made to the discharge of a usurious interest and

at the same time exact as a penalty the forfeiture of double the amount.

In the case of Harvey *vs.* Nat'l Life Insurance Company (sup. court Vt.), reported at page 7, 14 Atl. Rep., it was held that where on the receipt of a note for $1,000 and interest the lender counted out $1,000 in money and then took therefrom $100, being the usury agreed upon, the statute of limitations does not begin to run against an action to recover usury until the note is fully paid.

This doctrine, we think, is in accord with the decisions of the Supreme Court of the United States, rendered in the construction of a statute so nearly resembling our own as to make the decisions of that court instructive, if not conclusive.

What is known as the national bank act, Rev. Statutes, sec. 5193, or so much as is necessary to quote, is as follows:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which 238 the note, bill, or other evidence of debt carries with it or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid or his legal representatives may recover back in an action in the nature of an action of debt twice the amount of the interest thus paid from the association taking or receiving the same: Provided such action is commenced within two years from the time the usurious transaction occurred."

While the phraseology differs, the two statutes provide for substantially the same thing—the recovery of usurious interest within a given time "after such cause of action accrued" (the New Mexico statute) or "from the time the usurious transaction occurred." (The national statute.)

The construction given to this latter statute is that the limitation runs from the date of the last payment.

Duncan *vs.* First Nat'l Bank Mt. Pleasant, 1 Nat. Bank Cases, 362.

72 Penn. St., 209.

Kearny *vs.* 1st Nat'l Bank Clarion, 18 Atl. Rep., 598.

14 *ibid.*, 8 & 9.

And, indeed, upon reason as well as upon authorities, we think this is the proper construction if we are to give effect to the contract out of which the usurious transaction grows. If the contract is valid to the extent of the principal and legal interest, there seems to be no sound reason why the borrower should be allowed to recover as a penalty twice the amount of the usury while he is still indebted to the lender the entire amount of principal and legal interest. We have given careful attention to the argument, pressed upon our consideration with so much zeal and ability and supported by so many authorities of great respectability, in support of the doctrine that this contract, being usurious, was therefore void. It is now well settled that the reservation of usurious interest does

not render the contract void unless the statute prohibiting the usury in express terms declares such contract to be void.

In the case of Farmers' Nat'l Bank *vs.* Deering, 91 U. S., 35, Mr. Justice Swain, delivering the opinion of the court, said:

"Where a statute prescribes a rate of interest and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken and void as to the excess. Burnhisel *vs.* Firman, assignee, 22 Wall., 170; German *vs.* Calvert, 12 Serg. & R., 46. Forfeitures are not favored in the law. Courts always incline against them. Marshall *vs.* Vicksburg, 15
239 Wall., 156. When either of two constructions can be given to a statute and one of them involves a forfeiture the other is to be preferred. Vattel, 20th rule of construction.

"Where a statute creates a new offense and denounces the penalty or gives a new right and declares the remedy the punishment or the remedy can be only that which the statute prescribes. Stafford *v.* Ingersoll, 3 Hill, 38; First National Bank of Whitehall *v.* Lamb, 57 Barb., 429."

And again in construing the national bank act the same court, speaking through Mr. Justice Harlan, in the case of Oakes *vs.* National Bank, 100 U. S., 249, says:

"The statute under which the bank was organized, known as the national banking act, does not declare the contract under which the usurious interest is paid to be void.

"It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid. If we should declare the contract of indorsement void and consequently that no right of action passed to the bank on the note transferred as collateral security an additional penalty would thus be added beyond those imposed by the law itself.

"On what principle could this court add another to the penalties declared by the law itself? De Wolf *v.* Johnson, 10 Wheat., 367; Farmers' & Mechanics' National Bank *v.* Dearing, 91 U. S., 29; Barnett *vs.* National Bank, 98 *id.*, 555."

If it should be insisted that this contract ought to be declared void for the reason that its execution was made a misdemeanor by the statute, in which particular it differs from the national bank act, which does not make the act a misdemeanor, but simply declares a forfeiture, we reply that our construction is nevertheless within the rule laid down by the Supreme Court in the case just quoted. It is true that the statute makes such a transaction a misdemeanor, but the same statute prescribes the punishment, to wit, a fine of not less than twenty-five dollars nor more than one hundred dollars and the forfeiture of double the amount of such interest so collected or received. If the legislature had intended to forfeit the entire debt or to render the transaction void nothing would have been easier than to have so declared.

240 The instructions of the learned judge who tried this cause in the court below were given in strict accord with the theory of the leading English case (which, as we have seen, has been

adopted by some of our State courts) and was a clear and correct exposition of the law from that standpoint; and while we admit that there is some conflict of authorities on the points mainly controverted, we are nevertheless of the opinion that the judgment was erroneous and that the cause must be remanded, with directions to the court below to proceed in accordance with the views herein announced.

A. A. FREEMAN,
Associate Justice.

We concur.
E. P. SEEDS, *A. J.*
WM. D. LEE, *A. J.*
J. R. McFIE, *A. J.*

UNITED STATES OF AMERICA, }
Territory of New Mexico. }

I, H. S. Clancy, clerk of the supreme court of said Territory, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, judgment rendered, and opinion filed in the cause herein mentioned as the same now appears remaining in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the Territory of New Mexico this first day of September, A. D. 1893.

[Seal Supreme Court, Territory of New Mexico.]

H. S. CLANCY, *Clerk.*

241 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between The Scottish Mortgage and Land Investment Company of New Mexico (Limited), plaintiff in error, and William H. McBroom, defendant in error, a manifest error hath happened, as it is said, to the great damage of the said defendant in error, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, 1893, next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, this fifth day of August, 1893.

[Seal Supreme Court, Territory of New Mexico.]

H. S. CLANCY,
Clerk of the Supreme Court of the Territory of New Mexico.

I hereby make return to the foregoing writ by annexing thereto an authenticated transcript of the record, citation to the adverse party, and the opinion filed in said cause, under my hand and the seal of the supreme court of the Territory of New Mexico.

[Seal Supreme Court, Territory of New Mexico.]

H. S. CLANCY, *Clerk.*

242 The United States of America to the Scottish Mortgage and Land Investment Company of New Mexico (Limited), Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington, District of Columbia, on the second Monday of October, A. D. 1893, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein William H. McBroom is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to all parties in that behalf.

Witness the Honorable James O'Brien, chief justice of the supreme court of the Territory of New Mexico, this fifth day of August, A. D. 1893.

[Seal Supreme Court, Territory of New Mexico.]

JAMES O'BRIEN,
Chief Justice of the Supreme Court of the Territory of New Mexico.

Service of copy of above citation is hereby acknowledged this 29th day of August, 1893.

A. A. JONES,
Attorney for Defendant in Error.

243 In the Supreme Court of the United States.

WILLIAM H. McBROOM, Plaintiff in Error, *vs.* THE SCOTTISH MORTGAGE & LAND INVESTMENT COMPANY, Defendant in Error.	Error to the Supreme Court of the Territory of New Mexico.

Frank Springer, of lawful age, being duly sworn, upon his oath says that he was in the court below and still is attorney for the said William H. McBroom, plaintiff in error in the above-entitled cause;

that the value of the matter in dispute in said cause, exclusive of costs, is thirteen thousand dollars.

FRANK SPRINGER.

TERRITORY OF NEW MEXICO, }
County of Santa Fé, } *ss:*

On this 4th day of August, A. D. 1893, before me, clerk of the supreme court of the Territory of New Mexico, came Frank Springer, who, being by me duly sworn, did depose and say that the foregoing affidavit by him subscribed is true.

Witness my hand and the seal of said court the day and year last above written.

[Seal Supreme Court, Territory of New Mexico.]

H. S. CLANCY, *Clerk.*

[Endorsed:] No. —. In the Supreme Court of the United States. William H. McBroom *vs.* The Scottish Mortgage & Land Investment Company of New Mexico (Limited). Affidavit. Filed Aug. 5, 1893. H. S. Clancy, clerk.

244 In the Supreme Court of the United States.

WILLIAM H. MCBROOM, Plaintiff in Error, *vs.* THE SCOTTISH MORTGAGE AND LAND Investment Company of New Mexico (Limited), Defendant in Error.	Error to the Supreme Court of the Territory of New Mexico.

Now, on the fourth day of August, A. D. 1893, comes the said William H. McBroom, by Frank Springer, his attorney, and says that in the record and proceedings in the cause lately pending in the supreme court of the Territory of New Mexico, wherein said The Scottish Mortgage and Land Investment Company of New Mexico (Limited) was plaintiff in error and the said William H. McBroom was defendant in error, there is manifest error in this, to wit:

I.

That the said supreme court, as appears by its opinion in said cause, in substance held and decided that, under the usury law of the Territory of New Mexico contained in sections 1736, 1737, and 1738 of the Compiled Laws of New Mexico of 1884, the cause of action created by said law for the recovery of double the amount charged, received, or collected as interest at a higher rate than twelve per cent. per annum, by means of discount, commission, agency, or any other subterfuge, does not accrue until the principal debt and lawful interest is fully paid.

II.

That the said supreme court, as by its opinion in said cause appears, in substance held and decided that a contract made in violation of the said usury law is not void.

III.

That the said supreme court, as by its opinion in said cause appears, held and decided that in the said cause "the better rule is to treat the usurious transaction (or rather the transaction claimed to be tainted with usury) as valid to the extent of the principal sum and the legal interest, and to treat all payments made thereon, whether received as usury or as a bonus or commission, *eo nomine*, as a reduction of the legal interest and principal."

245 IV.

That the said supreme court failed to hold and decide that in the said cause the doctrine of *locus penitentiae* does not apply, for the reason that defendant in error, by its conduct in relation to the usurious transaction, affirmatively showed its intention not to apply the usurious payment in reduction of the principal or interest.

V.

That the said supreme court failed to hold and decide that the entire contract of which the usurious transaction formed part was unlawful, and that there was no legal part of the debt to which such payment could have been applied.

VI.

That the said supreme court, upon the grounds aforesaid only, reversed the judgment of the district court for the fourth judicial district of the Territory of New Mexico in and for the county of San Miguel, whereas the rulings and decisions of said district court upon the said questions were not brought before said supreme court for review by proper exceptions or assignment of errors.

VII.

That although the judgment of said district court in said cause was a legal and proper judgment and should have been affirmed, nevertheless said supreme court, by its opinion, decision, and judgment in said cause, held that the judgment of said district court was erroneous, reversed the same, and rendered judgment that the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), plaintiff in error therein, go hence without day.

Wherefore the said William H. McBroom prays that the judgment of said supreme court of the Territory of New Mexico be re-

versed and for naught held, and that said court be ordered to enter a judgment affirming the judgment of said district court in said cause, in favor of said William H. McBroom, with costs.

FRANK SPRINGER,
Attorney for Plaintiff in Error.

[Endorsed:] No. —. In the Supreme Court of the United States. William H. McBroom *vs.* The Scottish Mortgage & Land Investment Company of New Mexico (Limited). Assignment of errors. Frank Springer, Las Vegas, New Mexico, attorney for McBroom.

Endorsed on cover: Case No. 15,412. New Mexico Territory supreme court. Term No., 1028. William H. McBroom, plaintiff in error, *vs.* The Scottish Mortgage and Land Investment Company of New Mexico, Limited. Filed October 5th, 1893.

Office Supreme Court U. S.
FILED.
DEC 12 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

October Term, 1893.

TERM No. 1028.

WILLIAM H. McBROOM,
Plaintiff in Error,
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY OF NEW MEXICO (LIMITED),
Defendant in Error.

In Error to the Supreme Court of the Territory of New Mexico.

Brief and Argument for Plaintiff in Error.

FRANK SPRINGER,
Counsel for Plaintiff in Error.

CARRUTH PRINTER AND BINDER EAST LAS VEGAS

Supreme Court of the United States.

October Term, 1893.

TERM NO. 1028.

WILLIAM H. McBROOM, *Plaintiff in Error,* *vs.* THE SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY OF NEW MEXICO (LIMITED), *Defendant in Error.*	In Error to the Supreme Court of the Territory of New Mexico.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

This is an action of debt brought by the plaintiff in error in the District Court for the Fourth Judicial District of New Mexico, under the usury law of the Territory, to recover a statutory forfeiture of double the amount of money paid as bonus for a loan, in excess of the lawful rate of interest. The cause was tried before a jury, which returned a verdict for plaintiff in the sum of $13,000. Judgment was rendered on the verdict, from which defendant prosecuted a writ of error to the Supreme Court of the Territory,

where the judgment was reversed. The decision of the Supreme Court upon the law of the case was conclusive of the litigation, so that a retrial in the lower court would be an idle form, and would involve useless expense and delay. Therefore, that Court, pursuant to Section 2190 of the Compiled Laws of New Mexico, entered a final judgment for defendant. To review that judgment plaintiff has sued out a writ of error from this Court, and has assigned the following errors:

ASSIGNMENT OF ERRORS.

I.

"That the said Supreme Court, as appears by its opinion in said cause, in substance held and decided that under the usury law of the Territory of New Mexico, contained in Sections 1737 and 1738 of the Compiled Laws of New Mexico of 1884, the cause of action created by said law for the recovery of double the amount charged, received or collected as interest at a higher rate than twelve per cent per annum, by means of discount, commission, agency, or any other subterfuge, does not accrue until the principal debt and lawful interest are fully paid."

II.

"That the said Supreme Court, as by its opinion in said cause appears, in substance held and decided that a contract made in violation of the said usury law is not void."

III.

"That the said Supreme Court, as by its opinion in said cause appears, held and decided that in the said cause 'the better rule is to treat the usurious transaction (or, rather, the transaction claimed to be tainted with usury) as valid to the extent of the principal sum and the legal interest, and to treat all payments made thereon, whether received as usury, or as a bonus or commission *eo nomine*, as a reduction of the legal interest and principal.'"

IV.

"That the said Supreme Court failed to hold and decide that in the said cause the doctrine of *locus penitentiæ* does not apply, for the reason that defendant in error, by its conduct in relation to the usurious transaction, affirmatively showed its intention not to apply the usurious payment in reduction of the principal or interest."

V.

"That the said Supreme Court failed to hold and decide that the entire contract, of which the usurious transaction formed a part, was unlawful, and that there was no legal part of the debt to which such payment could have been applied."

VI.

"That the said Supreme Court, upon the grounds aforesaid only, reversed the judgment of the District Court for the Fourth Judicial District of the Territory of New Mexico in and for the County of San Miguel; whereas the rulings and decisions of said District Court upon the said questions were not brought before said Supreme Court for review by proper exceptions or assignment of errors."

VII.

"That although the judgment of said District Court in said cause was a legal and proper judgment, and should have been affirmed, nevertheless, said Supreme Court, by its opinion, decision and judgment in said cause, held that the judgment of said District Court was erroneous, reversed the same, and rendered judgment that the said The Scottish Mortgage and Land Investment Company of New Mexico (Limited), plaintiff in error therein, go hence without day."

Although the questions presented are matters of law, it is necessary to an intelligent discussion of them that the facts disclosed by the record, and about which there is no conflict of evidence, should be stated.

STATEMENT.

On June 23d, 1883, the Scottish Mortgage and Land Investment Company of New Mexico (Limited), a corporation organized under the laws of Great Britain, filed in San Miguel County, New Mexico, its certificate of incorporation and articles of association, and a certificate designating Las Vegas as its principal place of business in New Mexico, and George J. Dinkel as its authorized agent, pursuant to the laws of the Territory allowing foreign corporations to do business there. By the articles of association the principal objects of this company were stated to be "the investment of money on loan on the security of real or heritable or of household estate, or cattle, or sheep, or other live stock, and movable goods and chattels, in the United States." The business of the company was to be managed by the directors. The directors were empowered to appoint a manager, or managers, and other necessary officers, and an advising board in America, with such powers and duties as they may from time to time prescribe. (Rec. p. 58-62) Previous to filing these papers, the company, in anticipation of commencing business in New Mexico, entered into a contract with George J. Dinkel, of date Oct. 19, 1882, appointing Dinkel and one Browning local managers of the company in New Mexico; in which it was provided in article 4, that "*all commissions on loans by the company, and all bonuses or penalties payable by borrowers from them in respect of such loans, shall belong to the company.*" (Rec. p. 53-55.) This contract was to run for three years, and thereafter to be terminable by either party on giving six

months notice. Browning died, and Dinkel carried on the business alone; so that in 1886 he occupied the position of "general manager of the company," having "general charge of the company's business in New Mexico." (Rec. p. 50.) The head office of the company was in Glasgow, Scotland, and it had its board of directors there. In 1886 the president of the company was Colin J. McKenzie, and the business of the company was attended to at its headquarters in Scotland by Messrs. Carson and Watson, who occupied the position of "managers."

The company was at that time actively engaged in the business of loaning money in New Mexico, and that was its only business there. Mr. Dinkel had the general charge of it, and was in constant correspondence with the managers at the home office in relation to its transactions. There was also an advising board at Las Vegas, consisting of William A. Vincent, who was also counsel for the company, Jefferson Raynolds, and Charles Blanchard. (Rec. p. 50.)

Under these circumstances the events occurred which form the basis of this litigation.

On Feb. 5th, 1886, William H. McBroom made an application to the company through Dinkel for a loan of $65,000, to be secured by mortgage on his land and live stock, which Dinkel transmitted to the home office for instructions, by a letter in which he says:—(Rec. p. 68.)

"I enclose a paper from the pen of Mr. W. H. McBroom, one of our largest ranchmen, descriptive of his property, and making an application for a loan of $65,000, or a proposition for a sale of his property in whole or in part. * * * There is no finer ranch in the Territory than the one offered by Mr. McBroom, and his cattle are said to be far ahead of any in this country. I have

never seen them myself, but have conversed with those who have, and all who know them speak in the highest terms of them. The live stock alone is worth about twice the sum for which he applies, at present prices, and there is no possibility of them being any less. * * * I have laid this application before a board meeting at which were present Mr. Raynolds and Judge Vincent, and they recommend the same to your consideration and favorable action."

McBroom's statement, transmitted with this letter, contains an inventory of the property with values attached, amounting in all to $237,570. This was made up of real estate, $102,000, chattels $135,570. (Rec. p. 70.) The application was refused, for the reason that the amount was too large. (Rec. p. 71.)

On July 14th, Dinkel, as general manager, wrote again to Carson and Watson, managers, at Glasgow, stating that McBroom had renewed his application for the loan; first proposing to pay a commission of $6,000 for securing the loan, and afterwards to give a one-fourth interest in his entire ranch and stock, which one-fourth interest Dinkel then estimated to be worth $50,000. His letter proceeds:

"W. H. McBroom, who made application for a loan of $65,000 some time ago, had made me a proposition by which I was to receive a commission of $6,000, if I secured a loan for him of $65,000 at ten per cent, for six years, and I succeeded through eastern parties, in raising the funds, with the help of a relative of Judge Vincent, but the parties who had promised to put up the funds could not do so, as they were themselves disappointed, and only $40,000 was put up, which of course, would not do. Well, upon my return from the lower country a few days since, Mr. McBroom, who must have the money within the next two months, and despairing of procuring same from sources already tried, made me a proposition to the effect that he would give me a one-fourth undivided interest in his entire

ranch and stock, if I could raise him the money. Such interest is to-day fully worth $50,000, and in five years would surely be worth $100,000. Now, such a proposition comes only once in a very great while, *and I was anxious the company should have the benefit of this great commission, which would be in addition to the ten per cent. interest he proposed to pay.* I finally concluded I would wire you for the money, and if you sent it I would make a deal that would, I felt sure, meet with the full approval of the directors, were they advised of the proposition." (Rec. p. 72-3.)

A director's meeting was held to consider this letter, (Rec. p. 75) and the board concluded to decline the offer—not because they did not want to receive the commission, but because they feared the company might become complicated as partner with McBroom Dinkel was advised accordingly by letter of the managers, August 2d, 1886. (Rec. p. 75-76) On the same day, Colin J. McKenzie, president of the company, wrote Dinkel, (Rec. p. 56,) giving a further account of the meeting, and saying:

"In regard to the McBroom business, I very strongly urged on my colleagues that if we could get the other parties, whom you have already interested, to stand aside, we might give him the whole $65,000 at twelve per cent., and in that event perhaps Mr. McB. *might still consider you entitled to a commission.* Mr. Carson will write to you on this matter, and I hope it may somehow be arranged; for I think it would be a very satisfactory transaction for us; the security is excellent, and you would get your reward."

September 4th, Dinkel cabled to the home office that "McBroom backed out," (Rec. p. 81); but later on negotiations were renewed, and on September 20th, Dinkel cabled the home office as follows:

"Will directors now loan McBroom $65,000, first year six per cent., after that ten per cent., with quarter interest?" (Rec. p. 82.)

The board of directors met to consider this communi-

cation, and instructed the managers, Carson and Watson, to send the following reply by cable, which was done September 23d:

"McBroom. The board sanction a loan of $30,000.00, first mortgage ten per cent., or $65,000.00 twelve per cent., decline quarter interest, *but get best cash bonus possible instead*, or get third party to buy quarter interest, and pay us." (Rec. p. 82.)

This was followed by a letter from the managers to Dinkel, confirming the cable, and giving again as a reason for not accepting the fourth interest the fear of "being mixed up as a partner with McBroom"; and then they proceed:

"But it occurred to the board that you might in some way accept the quarter interest of McBroom, having previously arranged to dispose of it at once to some one who would take it off our hands, freeing us of all responsibility, and paying us a handsome price, *which we would treat as a bonus upon the loan;* or else *McBroom himself would give a good bonus* if we relinquish the quarter interest. We trust our cablegram has made this quite clear to you." (Rec. p. 82.)

On September 24th, Dinkel cabled: "McBroom arranged, send $15,000 on to complete." (Rec. p. 83.)

And on the 25th, the managers wrote to Dinkel, by direction of the board of directors, expressing "their very high appreciation of your unwearied efforts to carry through the McBroom transaction," (Rec. p. 83.); and noting in a postscript the receipt of his "cablegram intimating the completion of the transaction with McBroom for $65,000.00;" of which result they say they "are very pleased to be advised." (Rec. p. 84.)

All these facts are shown by the official letters and records of the company, produced on the trial.

As a result of this correspondence, and in pursuance of the cabled instructions of the board of directors, Dinkel, general manager of the company's business in New Mexico, on September 25th, 1886, loaned McBroom $65,000 of the company's money at 12 per cent interest, and charged, collected and received from him, as a bonus for the loan, $6,500;—thus faithfully complying with his instructions to "get the best cash bonus possible."

The loan was evidenced by one principal promissory note for $65,000, payable six years after date, with interest at the rate of twelve per cent. per annum, represented by seven interest notes: one for $2,842.19, due Dec. 31, 1886; five for $7,800 each, due respectively on Dec. 31st of the years 1887, 1888, 1889, 1890 and 1891; and one for $4,965.57, due August 20th, 1892. The interest notes to bear interest at two per cent. per month after maturity. These notes were secured by a deed of trust of the real estate mentioned in McBroom's proposition, and a chattel mortgage upon the cattle, horses and other personal property therein mentioned, with the exception of the steers. The notes and mortgages, though executed September 25th, 1886, were dated back to August 20th. (Rec. p. 15.) The deed of trust contained full power of sale by the trustee in case of default, and provided that in default of any payment of interest the whole principal might be declared due, and the property sold to pay it. The chattel mortgage authorized the mortgagee or its agent, upon default, to take possession of the property and sell as prescribed by law; which was upon ten days advertisement. (Rec. p. 22-34) The $65,000 was received by McBroom on the day of the execution of these securities, and on the same day

he paid back, as a bonus for the loan, $6,500 cash, by endorsing one of the company's checks, which had been made for that exact amount, and handing it to Dinkel or Vincent, both being present; and also $2,000 in his notes to Dinkel. (Rec. p. 15-18, 49.)

On October 6th following, Dinkel wrote the home office, giving a full report of the consummation of the McBroom loan. He then informed them that he had paid half of the $6,500 bonus to Mr. Vincent for his services in the negotiation, and still had the other half; that Vincent had advised him that "if the company took any portion of this commission, it would be liable to the borrower for double the sum, which he could, and under the present circumstances no doubt would, recover the same from the company, by a suit in the District Court;" that he (Dinkel) had made up his mind "that the company should have the commission, or the part I control;" and he proposed that he would keep the money for three years, until the statute of limitations should run against the usury claim, and give the company his note for it. He explains:

"I make the note for three years, as the usury law provides that to recover under it, suit must be brought within three years from the time the cause for the action accrued. The cause for action accrued Sept. 25th, 1886, the day the loan was completed, and after three years I could pay it to the company, as the statute of limitation would bar action after that. Should action be had before the expiration of the three years, I could then have you return me the note and I would destroy it, when the matter would stand as at present, and then again, when the action would be terminated I could renew my note, which could be continued until the end of the three years." (Rec. p. 84-86.)

To this the board, through the managers, answered

Nov. 12th, 1886, that they were ignorant that the transaction would be struck at by the usury laws, and objected to Mr. Vincent being paid any part of the bonus, as he was "the company's paid attorney, and one of the advisory board." (Rec. p. 87-88.)

On November 26th, 1886, they wrote further on the subject, saying in substance that they had concluded that the company would be liable for usury if either Dinkel or Vincent kept the money, and requesting that the $6,500 "should be paid to the company as a payment on account of the first year's interest due by McBroom, and that McBroom should be notified that this has been done, and a proper receipt given him for it." (Rec. p. 88.) This Mr. Vincent declined to do, arguing that the company was not guilty of usury as the matter stood. (Rec. p. 89, 90-91.)

On January 11th, 1887, the board responded:

"The board had Mr. Vincent's letter under their anxious consideration. Looking to the whole circumstances of the case the board are inclined to *waive the request* in our letter of 20th November, that Mr. Vincent should repay the sum he received from McBroom; but they must ask you to obtain from Mr. Vincent the certificate he intimates on page three of his letter he is willing to give as to the safety of the company's position, and also *a guarantee from him, to relieve the company of any loss it may sustain*, should McBroom ultimately refuse to implement his bargain on the plea of usury. He can have no hesitancy in acceding to this request, looking to the very decided opinion he appears to hold regarding the company's position." (Rec. p. 91.)

The required guarantee was furnished by Vincent, and accepted by the board as satisfactory, April 6th, 1887, as follows:

"We have your letters of 7th, 10th, 12th and 15th ul-

timo, to reply to. We have also received from you Mr. Vincent's *letter of guarantee* to you, dated 14th February, 1887, *re* McBroom matter, *which the board accept as sufficient.*" (Rec. p. 92.)

In the meantime, the first interest note for $2,842.19, which fell due Dec. 31, 1886, was paid at maturity by McBroom, and collected by the company without any deduction or allowance on account of the bonus. (Rec. p. 36–37.)

Dinkel remained general manager of the company in New Mexico until June 1st, 1889, (Rec. p. 56); and Mr. Vincent its counsel until after the commencement of this suit, as the pleadings in the case show. Dinkel was under bond of $5,000 to the company, and the owner of 100 shares of its stock. (Rec. p. 55, 78.)

On March 3d, 1887, after the board had concluded, upon receiving Vincent's guaranty, not to refund the bonus money by crediting it on McBroom's interest account, the company took *new and additional security* in the form of a chattel mortgage covering the steers (which had been reserved by McBroom out of the chattel mortgage given upon his herd at the time of the loan), *to secure the payment of all the remaining interest notes* after the first one for $2,842.19, which had been paid. These amounted in all to $43,965.57, and no deduction or allowance was made upon them for the $6,500 bonus. (Rec. p. 34–36.)

The company thus, by the deed of trust and two chattel mortgages, had security for its loan of $65,000 and interest, upon property which was worth, according to McBroom's inventory $237,570 (Rec. p. 70); and according to Dinkel's letter to the board, of July 14, above quoted, at least $200,000. (Rec. p. 73.)

McBroom, with his property thus tied up, proved unable to pay the interest notes thereafter maturing.

On March 5th, 1889, Messrs. Dinkel and Vincent, as general manager and counsel for the company, having been directed by the home office to foreclose the mortgages, first sought to obtain from McBroom an agreement to release his claim against the company for usury; and they presented him a paper to sign, in the handwriting of Vincent, which was as follows: (Rec. p. 114–115)

"Las Vegas, New Mexico, March 5th, 1889.

"In consideration of the sum of One Dollar, to me in hand paid, the receipt of which is hereby acknowledged, and the further consideration of *two week's delay* in the foreclosure of its mortgage, I hereby *waive and release to the Scottish Mortgage and Land Investment Company* of New Mexico (Limited), and George J. Dinkel, any right, claim or demand I may have connected with the *subject of usury* in relation to the making of the loan to me by said company."

This paper McBroom declined to sign. It appears from Mr. Vincent's testimony, (Rec. p. 103,) that about this time instructions had been received to foreclose the mortgages, and that the papers had been placed in his hands by Dinkel to write the notice of foreclosure sale, and that Dinkel instructed him to "hold the papers;" which he did, and did not then proceed with the foreclosure.

Two and a half years had then elapsed, out of the three years required to bar the action for usury. No offer had been made to refund the usurious bonus, or to credit it to McBroom for interest or principal. But after obtaining new and valuable security for the whole of the unpaid original interest notes, and having now his entire ranch property, real and personal, covered by mortgages

to secure the usurious loan, the company magnanimously proposes to McBroom, if he will release to the company and its general manager his right of action for usury, to pay him one dollar,—and *grant him "two weeks delay in the foreclosure of its mortgages!"*

McBroom declining to purchase so short grace at price so dear, both parties waited;—McBroom presumably for some proposition he could afford to accept; and the company for the expiration of the three years from Sept. 25th, 1886, so lucidly explained in Dinkel's letter of Oct. 6th, above quoted, as the time when McBroom's cause of action would be barred by the statute of limitations.

McBroom waited until the last day, and then brought this suit, Sept. 24th, 1889; and afterwards the company *"sold under both mortgages, both the chattels and real estate. They sold all the stock, and all the real estate."* (McBroom's testimony, Rec. p. 49.)

And upon the trial of this cause, McBroom testified that the $6,500 paid by him as a bonus for the loan *had never been repaid to him, or credited to his credit in any way.* (Rec. p. 37.)

That statement was never challenged by defendant; and stands uncontradicted and unquestioned in the record.

Upon these facts, and under proper instructions by the court as to the effect of the usury statute, and the liability of a corporation for the acts of its general officers, the jury returned a verdict for plaintiff in the sum of $13,000—double the amount of the bonus.

The verdict is conclusive of all the facts necessary to support it, so far as this record is concerned, if the law was properly given by the court.

No exception was taken to the giving or refusal of instructions, sufficient to bring them before an appellate court for review. The instructions given were embraced in twenty-seven paragraphs, three of them at the request of defendant. (Rec. p. 123-129.) Twenty-nine other separate instructions were requested by defendant and refused. (Rec. p. 130-135.)

The exceptions taken were as follows:

"Counsel for the defendant at the time of the giving of the foregoing instructions excepted as follows:

"To the refusal of the court to give the instructions asked by defendant; to each and all the instructions given by the court, asked for by plaintiff and given by the court; to all the instructions given by the court of its own motion, and also because the court failed to instruct as to the law of the case." (Rec. p. 129.)

If there is one thing touching practice in appellate tribunals that is thoroughly settled by authority, it is that errors of law in the giving or refusal of instructions will not be reviewed on any such wholesale exception as this:

Block vs. Darling, 140 U. S. 234.
Ins. Co. vs. Smith, 124 U. S. 405.
Moulor vs. Ins. Co., 111 U. S. 338.
U. S. vs. Hough, 103 U. S. 71.
Worthington vs. Mason, 101 U. S. 149.
Beaver vs. Taylor, 93 U. S. 46.
Beckwith vs. Bean, 98 U. S. 284.
R. R. Co. vs. Varnell, 98 U. S. 479.
Lincoln vs. Claflin, 7 Wall. 132.

The ruling of the trial court denying the motion to direct a verdict for defendant, made at the close of plain-

tiff's case, upon nineteen distinct grounds, (Rec. p. 65) cannot be availed of as ground for reversal, because defendant did not stand on it, but thereafter introduced evidence on his part.

R. R. Co. vs. Hawthorne, 144 U. S. 202.
Ins. Co. vs. Smith, 124 U. S. 424.
R. R. Co. vs. Mares, 123 U. S. 710.
Ins. Co. vs Crandell, 120 U. S. 527.
R. R. Co. vs. Varnell, 98 U. S. 479.

Another motion to direct a verdict was made by defendant at the close of all the testimony, in which there was a mere general reference to the former motion, without distinct specification of the grounds relied on, except two, neither of which were sustained by the appellate court. (Rec. p. 122.)

The lengthy assignment of errors in the Territorial Supreme Court contains no distinct reference to the ruling of the court upon the latter motion. (Rec. p. 139–140.)

It appears, therefore, that none of the rulings of the District Court were brought into the Territorial Supreme Court in proper form for review; and we have now assigned as error the action of that court in reversing the judgment of the District Court for errors of law not properly reviewable upon the record. (6th Assignment of Errors, *supra.*)

If this court should be of opinion, however, that the rulings of the District Court, as presented by the record, were reviewable, then I submit the following argument in support of their soundness.

ARGUMENT.

That the transaction in question was usurious, and was the act of the company, is beyond question. The court below so held, and its opinion on this point is impregnable both on principle and authority.

Fowler vs. Trust Co., 141 U. S. 384.
Sherwood vs. Rountree, 32 Fed. Rep. 113.
N. E. Mfg. Co. vs. Gay, 33 Fed. Rep. 636.

In its conclusion as to the effect of such usury upon the rights of the parties, we conceive that the learned court committed error, which we have specified in the first five assignments of error. The question turns upon the construction of the usury law of New Mexico, and its application to the facts of this case.

The statute was enacted April 3, 1884, (Session Laws 1884, ch. LXXX,) and is found in the Compiled Laws of 1884, sections 1737 and 1738, as follows:

"1737. Any person, persons, or corporation, who shall hereafter charge, collect or receive from any person a higher rate of interest than twelve per cent. per annum, shall be guilty of a misdemeanor, and upon conviction thereof before the district court or a justice of the peace, shall be fined in a sum of not less than twenty-five dollars nor more than one hundred dollars; and such person, persons, or corporation, shall forfeit to the person of whom such interest was collected or received, or to his executors, administrators, or assigns, double the amount so collected or received upon any action brought for the recovery of

the same within three years after such cause of action accrued.

"1738. The provisions of this act shall also apply to any person, persons, corporation, or officer of the same, who may charge, receive, or collect a higher rate of interest than twelve per cent. per annum, by means of discount, commission, agency, or any other subterfuge."

Upon this statute the court held that although usurious interest, bonus or commission was charged and collected, no action for the forfeiture provided by section 1737 would lie until the principal debt and interest at the lawful rate was paid; and that all payments by the borrower, whether received as usury, or as a bonus or commission *eo nomine*, should be treated as a reduction of the legal interest and principal. This was upon the theory that so long as anything remains unpaid on the principal debt and lawful interest, the usurer has a *locus penitentiae*, and may apply the usury upon the legal portion of the debt; and if he does not, the law will so apply it for him.

We contend that the effect of the statute above quoted is otherwise; and that under it, and upon the facts of this case, the theory upon which the learned court based its decision can have no application.

I.

The Cause of Action accrued upon Payment of the Bonus, or at all events upon the First Payment of Interest for a Fixed Period, in Addition to the Bonus.

The New Mexico usury law is directed against the loaning of money for more than twelve per cent. interest. Its prohibitory provisions are found in sections 1737 and 1738 above quoted. By the first of these sections it is made unlawful to "*charge, collect or receive*" a higher rate of interest than twelve per cent. per annum; and the offense is made a *misdemeanor* and is punishable both by fine, and forfeiture of double the usury collected or received. This is not a provision for two distinct offenses, with different consequences for each. The offense aimed at is the same, viz: the *charging, collecting or receiving usurious interest.* It is the *charging*, as well as the receiving, for which both fine and forfeiture are prescribed. The offense is committed by the *charging* alone, but the amount that may be recovered back is determined by the act of collecting and receiving. If the three things actually concur in point of time, the offense, and the right of action for a definite sum, are complete at that time. In order to avoid all possible doubt, the next section was added, declaring in express terms that the provisions of the act shall "apply to any person, corporation, or officer of the same, who may *charge, receive* or *collect*, a higher rate of interest than twelve per cent. per annum, *by means of discount, commission, agency, or any other subterfuge.*"

The intention of this law was to prevent the exaction of usurious interest in any form, by visiting upon it consequences of the greatest severity; and it was framed to preclude, as far as legislative foresight could do so, the possibility of evading it under cover of the theories upon which the defense in this case is founded. None of the authorities invoked in support of this defense, or cited by the learned court in its opinion, were based upon statutes in any way comparable to this. I will undertake to trace the course of adjudication upon the subject.

The leading case in England is *Loyd vs. Williams*, 3 Wils. 250. It arose in 1771, under the statute of 12 Anne, which provided: 1st, that no person upon any contract should take for loan of money above £5 for the forbearance of £100 for a year; 2d, that all bonds, assurances, etc., for payment of money upon usury over five per cent., should be void; 3d, that every person who should receive, by means of any corrupt bargain, etc., over five per cent. for a year, should forfeit to the borrower treble the value of the monies and other things lent. By another statute it was provided that all suits for penalties should be brought within a year next after the offense committed.

A loan of £100 was made for three months, the borrower at the time of receiving the money immediately paying back to the lender, out of the money borrowed, a premium above the legal rate by way of advance interest, and giving his note for the whole. The note was collected in full sometime after maturity. An action was brought for the penalty of treble the money paid, within a year after the total payment of the debt, but *more* than a year after the payment of the usurious advance interest. The question was—just as it would have been here if McBroom had

not brought his suit until after three years from his payment of the $6,500 commission—whether the action accrued at the date of the advance payment, and was therefore barred by the one year statute of limitations. The case was elaborately argued and carefully considered. The above argument of *locus penitentiae* was used there as here. The court held that the offense was complete when the advance interest was taken out, and therefore, more than one year having elapsed, plaintiff's action was barred. The facts, law and reasoning of the court in that case are perfectly applicable to this.

In the final opinion on p. 261 the court say:

"To constitute the offense for which the present action is brought, to recover treble the value of the money lent, these three things must concur: 1st, A contract between the parties; 2dly, Monies or other things lent; 3dly, Above 5 per cent per annum received by the lender for the forbearance. And whenever these three matters concur, then the offense is committed; no time is mentioned with respect to payment of the principal money lent; *the principal money may never be paid, and yet the offense be committed.*"

In *Fisher vs. Beasley*, Doug. 235, (1779,) a premium was taken in the first instance for the forbearance of a loan for six months, reserving interest; and the court held that the usury was not complete till the half year's interest was received, because the premium alone did not exceed the legal rate for the stipulated time.

In *Wade vs. Wilson*, 1 East. 195, (1800,) the question again arose. The loan was of £600 for a year, and at the time it was made the lender took ten guineas as a premium, and the borrower's note for the £600 with legal interest. At the end of a half year he collected the legal interest for that period. Suit for the penalty was brought im-

mediately afterward. It was objected principally that the loan being for a year and the premium paid for that time, the usury was not complete till the end of the year, when the whole interest was received in addition to the premium. But the court held that the receiving of legal interest for a half year, in addition to the premium, made the whole transaction usurious, and that the offense was then complete. Lord Kenyon C. J. said:

"The case of *Fisher* q. t. v. *Beasley* does not apply; for there the only question was, whether the usury were complete before the party had received any interest at all, the amount of the premium being within the legal rate of interest. But here the party having ten guineas premium in hand, and interest accruing from day to day, actually received interest *qua* interest for half a year, which made what he received upon the whole amount to more than lawful interest for that time upon the sum lent. It is impossible upon this statement not to say that the usury was complete when the half year's interest was received."

Lawrence J., said:

"The argument is, that the contract being for forbearance of principal for a year, and interest being reserved yearly, therefore there could be no usury committed till the end of the year; and it is supposed that the case of *Fisher v. Beasley* is an authority for that position. But that is not the case here; for the contract is stated to be *at the rate* of five per cent ; it is not stated that the defendant was to wait for his interest till the end of the year; but it was to accrue, as by law it does, *de die in diem.* Therefore after the receipt of the premium as soon as any interest as such was paid on the loan, though but for a day, it would constitute usury. The parties themselves did not consider that interest was not due till the end of the year, for it was actually paid by the one and received by the other at the end of the first half year without objection. Here then is a premium paid of ten guineas at first which was to run through the whole year; and interest accruing daily on the principal sum, the defendant actually received interest for the first half year, which together with what he had before received by way of premium amounts to more than legal interest."

The case of *Scurry vs. Freeman*, 2 Bos. & Pul., 381, (1801) decided in the court of common pleas, is cited by the court below as indicating "a marked modification of the doctrine" of the English courts. But examination of the report fails to show it. A loan of £500 having been made, and a premium of £50 received on it, the lender afterwards collected five per cent. interest on the £500. The court held that the collecting of the five per cent. interest on the £500 was usurious, because the loan should be treated as actually for only £450. This is all the case holds.

Thirty years later, in *Wood vs. Grimwood*, 10 Barn. & Cressw. 698, (1830) the doctrine decided in *Loyd vs. Williams* and *Wade vs. Wilson*, *supra*, was emphatically reaffirmed. There a loan was made Sept. 9, 1826, payable in one year, with interest stipulated at the lawful rate, payable half yearly. By means of a subterfuge, a bonus or premium in addition to the interest was exacted and paid. In April, 1827, the half year's interest was paid; and at the end of the year the remaining interest and the principal debt were paid. Suit was brought in June, 1828, to recover the statutory penalty; *more* than one year after payment of the half year's interest in April, but less than one year after payment of the principal in October, 1827. The court held that the offense was complete when the first half yearly installment of interest was received in addition to the premium; and the action was therefore barred. Lord Tenterden, C. J., and all the other judges, concurred in this opinion. The case of *Scurry vs. Freeman*, *supra*, was cited, and the court held that it established nothing to the contrary—Bailey, J. remarking: "*Scurry vs. Freeman* may be right, and undoubtedly would be right, provided the

lender of the money (£500), after the £50 was retained, had claimed £450 as the debt."

The same reasoning applies to the case at bar. The loan of $65,000 might, after the payment of the $6,500 bonus, be treated as a loan of only $58,500: *were it not for the fact that the Scotch company, by all its subsequent acts expressly declined to do so.*

The English doctrine that the cause of action for penalty accrues whenever usury as interest is actually paid, was generally followed in the earlier American cases, but was afterwards modified, and in some cases abandoned; chiefly owing to changes in legislation on the subject of usury.

It is undoubtedly true that in several courts of high authority, the doctrine of *locus penitentiae* has been applied in the later cases. But every one of the cases so decided will be found to arise, either, 1st, under circumstances which left the intention of the lender open to doubt as to the application of the usurious payment; or 2d, under statutes by which usurious contracts were not unlawful. Not a single one of them was decided under a statute by which the usurious contract was void, or under circumstances in any way comparable to those of this case.

The English doctrine In North Carolina, ~~X~~ was adopted in the following terms:

> "Whenever parties make a contract for moneys or other things, and above the rate of five per centum per annum is received by the lender; the offense against the statute is complete; and even if the principal money shall never be paid, yet the offense is committed."
>
> *Seawell vs. Shomberger*, 2 Murph. (N. C.) 200, (1811).

The Supreme Court of Vermont in 1847 recognized the doctrine of *Lloyd vs. Williams*, and cited that case, saying:

"Whenever the usury, *eo nomine*, is paid, the right to recover the surplus is perfect, notwithstanding the debt may never be paid."

Grow vs. Albee, 19 Vermont 543.

"No obstacle to a recovery exists in the circumstance that the large note (for principal) was not paid until after the commencement of this suit. Its payment at all was not essential to the plaintiff's right to recovery. The $50 notes contained usury; and when the defendant accepted the money upon them, as he did before suit was brought, and surrendered the notes, he took usurious interest within the meaning of the statute. When so received and applied, there is no room for presumption, in the absence of any declaration to that effect, that he would apply the money or any portion of it to the debt which was justly due to him. *The result showed that he did not so apply it.*"

Nelson vs. Cooley, 20 Vermont, 204.

In *Davis vs. Converse*, 35 Vt. 507, (1862,) Poland C. J., for the court said:

"It seems now to be settled by repeated decisions that where usury is included in a note, or other security, and when paid is endorsed upon the note, it is to be considered as a payment on the note itself, and no action can be maintained to recover back the usury paid, so long as there remains due any part of the principal and lawful interest; but that where the security is only for the principal and legal interest, and the unlawful interest is either put into a separate obligation, or rests in a verbal agreement, so that when paid it is not endorsed upon the note, but is paid as usury, *eo nomine*, it is otherwise, and a right of action accrues immediately to sue and recover it back, though the lawful debt is still unpaid."

The later decisions, as *Harvey vs. Ins. Co.*, 60 Vt.

209, (1888,) give the further reason that if a note is given for $1,000 and the lender immediately pays back $100, it is only a loan of $900, and nothing is *paid* by the borrower on which he can recover. This is on the theory that such a taking back of part of the nominal loan is a *discount*, and not a receiving of interest.

This is fully explained by Chief Justice Gibson, when the Pennsylvania courts were approaching this line of decision, in a case cited hereafter.

But this theory is completely destroyed by the second section of the New Mexico usury law, (Sec. 1738,) which appears to have been framed to meet it, viz: that the provisions of the act shall apply to every person, etc., who "charges, receives or collects" the prohibited usury, "by means of *discount* * * * or any other subterfuge."

In Massachusetts the course of decision has been similar to that of Vermont. In *Com. vs. Frost*, 5. Mass., 53, (1809,) the court, by Justice Parker, said:

"The second question reserved is whether, as the sum borrowed on usury has never been paid, the penalty could have accrued. The fact is, that at the very time of the loan the sum of $16 was paid to the defendant for the use of $200 for ninety days: this confessedly much exceeds the legal interest, * * * it being very clear that the taking of the $16 as the compensation for the loan, that sum exceeding lawful interest, completed the offense of usury, whether the principal sum was ever paid or not. This point was fully and clearly established in the case of *Loyd vs. Williams*, 3 Wils., 250. * * * The doctrine is that when the usurious contract, the lending and the forbearance or interest, concur, the offense is committed, and the limitation runs from that time *and not from the payment of the money borrowed to the lender*."

Simpson vs. Warren, 15 Mass., 460, (1819,) decides

that a suit for usury could not be maintained where the usury was simply deducted out of the sum lent, as a discount, and no money was ever paid; but it also holds that where the lender receives interest on a usurious contract, "he is therefore liable, whether he should ever receive the principal or not."

In *Stevens vs. Lincoln*, 7 Metc., 525, (1844,) the court said:

"In regard to the payment of the $1458.91, whether this was a payment of the usurious interest or a part of it, we are of opinion that while the usurious interest is unpaid there remains the *locus penitentiae*, that the party may relinquish it and recover for the balance of his debt, *the contract not being void by the statute.* And *in the absence of proof as to any appropriation of a partial payment*, the law will apply a payment to a valid demand rather than to an illegal one."

At this time the Massachusetts usury law expressly provided that the lender could recover the balance of the principal debt, after deducting a forfeiture of three-fold the usury. (Gen. St. Mass., C. 53., § 4-5.)

In *Smith vs. Robinson*, 92 Mass. 132, (1865) the doctrine of *locus penitentiae* was announced under the above law, as follows:

"No recovery of the forfeiture can be had unless there has been an actual payment of unlawful interest within two years. There is a *locus penitentiae* to the usurious lender, and if he receives no more than the sum lent, with lawful interest, he does not incur the penalty."

In *Bank vs. Childs*, 130 Mass. 520, (1880,) the court, after referring to the clause of the National Bank Law giving an action for double the interest paid in excess of the lawful rate, said:

"This remedy is applicable when the note has been paid, and, ordinarily at least, not till then."

In Pennsylvania, the first important case was that of *Kirkpatrick vs. Houston*, 4 Watts and Serg. 115. (1842.) The question was by what act usury was consummated, so as to give a right of action for the forfeiture under the statute of 1723 and 1785, which was copied from that of 12 Anne, with the clause declaring usurious contracts void left out.

There the usury was by means of discount at the time of the loan. Part payment was made, and suit for the penalty was brought before the residue was paid. The doctrine of *locus penitentiae* was invoked, and the lender even undertook to escape the penalty by remitting the usury. The opinion of Chief Justice Gibson in the case is such a complete discussion of the question that I quote it nearly entire:

"The court below seems to have thought him (defendant) at liberty to apply the payment received generally to the sound part of the demand, so long as no more than the sound part of it had been received, and directed a verdict for the defendant.

"The principle on which the character of the taking depends is that the illegality of the contract, which was for a sum in gross, leavened the whole mass. I will not say that the defendant might not have lawfully received the *pro tanto* payment specially in discharge of what was lawfully due; for it is the corruption of the taking, and not the corruption of the contract, which constitutes the offense to which the penalty is annexed; in which respect there is no essential difference between the British statute and our own. But a payment on the foot of the contract necessarily partakes of its qualities, and the question is whether the law intends that it is specially taken, when nothing is said or done to indicate it. The judge charged that the law applied the payment to the interest in the first place, and to the principal for the residue; whence he seems to have inferred the existence of a design to receive interest and principal only on the sum lent. But his rule would leave

the question of intent where he found it. The payment could not be referred to the sound part of the contract, for it had none. It is stated in the receipt to have been made on the judgment generally, and though the law were to apply a part of it to the interest lawfully due, the residue would still be applicable to the gross sum secured by the judgment, every particle of which was infected with the original vice The law, indeed, might just as well apply the payment to the sound part of the principal as to the sound part of the interest; but the truth is, it does neither. The rule of payment which makes the application first to the interest, and then to the principal, stops there, without discriminating between the sound and corrupt parts of either. But there was no room for discrimination, for the contract was so entire that every part of it was usurious; and though the lender did not incur the penalty by entering into it, yet the offense was consummated when he took *a part of the stipulated sum on the foot of the contract*, because he had carried a usurious contract *pro tanto* into execution. * * * Any other interpretation of the act would put it in the lender's power to stamp the character of guilt or innocence on it at the precise point of time convenient for him to elude a prosecution by means of the limitation attached to it Should the borrower sue at the receipt of the first payment, he might be told that he was too soon; should he wait till the whole was paid, he might be told that the offense had been committed long before, and that the year had gone by. He has a *locus penitentiae*, it is true; *but it ends when the first decisive step is taken;* for the first step towards the commission of a crime is itself criminal. I will not say that a payment might not, in peculiar circumstances, be received even on the contract; for this security, not being void with us for the whole as it is in England, is susceptible of modification; *but the offense is unquestionably consummated by taking a part on the foot of the contract as it stood originally.* To that effect is the first resolution of this court in *Musgrove vs. Gibbs*, (1 Dall. 216,) which, however, is said to be distinguishable from the present loan, inasmuch as the lender *took a new security* for the residue of the entire debt, and this showed, it is said, *a determination to insist on the usurious part of it.* But even in our case, the lender subsequently sued out execution for the whole, which equally evinced a determination to insist on the usurious part. Had

he meant to take only what was legally demandable, he would have better signified it by remitting the excess, and though he did so at the return of the execution, it was then too late; he had sinned away his day of grace, the offense was committed, and the act could not be recalled."

In *Lamb vs. Lindsey*, 4 Wallis. & Serg. 449, the court said:

"We are of opinion that * * * proof of taking more than legal interest, though it be the eighth or the twentieth time, will support a suit for the penalty if brought within a year after such taking."

In 1851, in *Oyster vs. Longenecker*, 16 Pa. St. 273, Gibson, Ch. J., again delivered the opinion of the court, as follows:

"It is settled that usury is not committed by payment of a premium less in amount than the legal interest. The offense consists by the statute, in taking more than six per cent. on a loan, and till more has been taken, the penalty is not incurred. *Lamb vs. Lindsey*, 4 Watts & Serg. 449, *Fisher vs. Beasley*, Doug., 235, *Wade vs. Wilson*, 1 East., 195, and *Scurry vs. Freeman*, 2 Bos. & Bal., 381, are sufficient for the principle. The only cases that might seem to collide with them are *Musgrove vs. Gibbs*, 1 Dal., 216, and *Kirkpatrick vs. Houston*, 4 W. & S., 115, which ruled that any taking of interest, however small, on a usurious contract, is a completion of the offense. A distinction between interest and a bonus may seem to be a flimsy one; but it is not. A return of part of the sum on which interest is received, reduces the contract essentially to a loan of the residue. The formal delivery of the whole with one hand, and the retrenchment of a part of it with the other, like the formal delivery of a chattel returned at the execution of a bill of sale of it, is, in either case, simply a transparent artifice to elude the statute. The money returned, unlike the silk gown sometimes exacted by a wife for joining in a conveyance, is not a premium, but a *discount;* and the detention of a part of a bank loan as payment of interest in advance is legalized only by inveterate custom. If there was such a detention in this case, the contract for the nominal

sum was usurious, but the offense was not committed *till something had been received on it.* In this view of the subject, it would seem to be indifferent whether the sum detained were greater than the amount of the interest or not; payment of interest on the usurious sum would still be necessary. But the point is immaterial, as the whole interest was taken within the period of limitation; for it was ruled in *Lamb vs. Lindsey*, and *Scurry vs. Freeman*, the latter of which is precisely like the case we have to deal with, that *every fresh taking is a fresh consummation of the same offense.*"

The later cases in Pennsylvania, decided under the National Banking act, though recognizing the doctrine of *locus penitentiae*, adhere in substance to the qualifications of that doctrine laid down by Chief Justice Gibson:

In *Brown vs. Bank*, 72 Pa. St. 209, the court said:

"There may be a good reason for this if it was the intention of Congress to give the bank a *locus penitentiae* so far as the penalty of double the amount was concerned, and allow them to save it by not actually taking it upon the maturity and payment of the debt. This accords with the general current of the decisions upon the construction of the usury laws *whenever the contract is not itself declared to be void by the statutes.* It is *actual payment* on the foot of the usurious contract, *either in part or in whole*, which consummates the usury, and from which the limitation of the action for the penalty commences to run; but lawful interest may be recovered in an action for the principal."

And in *Kearney vs. Bank*, 82 Pa. St. 490, (1889,) the same court said:

"The ruling complained of in the first specification of error was justified by the case of *Brown vs. Bank*, 72 Pa. St. 209, where it was held that '*it is actual payment on the foot of the usurious contract, either in part or in whole, which consummates the usury, and from which the limitation of the action for the penalty commences to run.*' If this were not so, and the usury is complete by merely including it in a renewal note, the penalty might be recovered without the payment of either principal or interest."

The result of the Pennsylvania cases, therefore, is that under a statute which imposes a forfeiture for the *taking* alone of usury, a reservation by way of discount at the time the loan is made will not give a right of action until there has been a payment on the contract, in whole *or in part;* but that the first *definite payment of interest for a fixed period* determines the character of the transaction and consummates the usury, so that a right of action then accrues.

The modern cases in Vermont and Massachusetts go further than this, in allowing to the lender a longer time to change his mind; and some of them give him until the liquidation of the entire debt in which to decide whether it best suits his interest to keep the usury, or give it up.

Now, a very little reflection will show that not a single one of these authorities can have the remotest application to the case at bar:

The principle upon which they are all based is that the mere act of taking interest in advance, by way of discount, leaves it an open question whether the lender intends to insist upon his usury, and that it remains for his future action to determine whether the transaction is usurious or not; and that so long as such doubt remains, the law will presume that he intended to apply the excessive payment to the part of the debt which is not usurious. Because under the statutes involved in those cases it is not the *charging* of excessive interest, that constitutes the usury, but only the *taking* or *receiving*. Those laws take no notice of the nature of the contract itself. The corruptness of the bargain does not enter into the question at all. Therefore the usurious or innocent character of the transaction can only be determined by future acts.

But by the statute of New Mexico, the nature of the transaction is *fixed by the contract itself*. The *charging* of more than twelve per cent. interest is made unlawful, and the excess so *charged* may as soon as received be recovered back two fold. And not only so, but this is in express terms made to apply to whatever is *charged*, collected or received, by *way of discount*.

The statute governing this case, by reading the two sections together, amounts simply to this:

"Whoever, by means of discount, commission, agency or other subterfuge, charges more than twelve per cent. per annum for the use of money, is guilty of a misdemeanor, and shall pay a fine; and he shall forfeit to the person paying it twice the amount collected; but the action must be brought within three years from the time such discount, etc., was charged, collected or received."

There is no room here for the person who violates this law to clear himself afterwards by changing his mind. The usury is consummated by taking the first money as a commission, *eo nomine*, outside of legal interest, and in pursuance of the bargain or charge. The cause of action is then complete, and the borrower is not only entitled to sue within three years from that time, but is bound to do so or be barred. And if, having made a special and distinct contract for payment in addition to the bonus, of the legal interest for a definite period, the lender collects and receives that *as the interest* when it becomes due, this act taints with usury the whole transaction beyond his power to change.

The moment money, or money's worth, is bargained for and received as a bonus or commission, in excess of lawful interest, the law fixes upon the transaction the stamp

of usury. It is not necessary to await the subsequent acts of the lender to determine its character, for the law does that at the outset. The receiving by the company of the *first interest payment* of $2,842 *for the fixed period ending Dec.* 31, 1886, in addition to the bonus, brings the case precisely within the rule laid down in the Pennsylvania cases down to the latest. It was a *payment in part*, on the foot of the contract, and it determined the usurious character of the contract and the bonus received upon it.

II.

No Locus Penitentiae, because Acts of Lender show Deliberate Intention to the Contrary.

The doctrine of *locus penitentiae* can never apply where the acts of the lender himself not only absolutely negative all such presumption, but affirmatively show his deliberate intent to adhere to the usury, and not to apply any part of the usurious bonus in reduction of either lawful interest or principal; but to insist upon payment to the uttermost farthing.

It is to be observed:

1. This was different from an ordinary discount. McBroom received the $65,000 from the company, and gave in return, not only his promise to pay, but also a deed of trust on real estate, with absolute power of sale to pay the entire loan upon default of a single interest note, and a mortgage upon chattels valued at $137,000. The effect of this chattel mortgage was to vest the legal title to the chattels in the company without sale or other proceedings, upon

the first default of any interest note or principal, leaving in McBroom, until it should be cut off by a public sale, only a right of redemption of the chattels by paying the full amount due. He therefore gave for the bonus, not simply his promise, but moneys worth twice over.

2. The principal debt of $65,000 was represented by one note, and the interest at twelve per cent. per annum was represented by seven separate and distinct notes, each being given for the forbearance of $65,000 for a fixed period. The first of these was for $2.842.19, due Dec. 31, 1886, and was for the forbearance of $65,000, nominally from Aug. 20, 1886, but actually from Sept. 25, 1886, to that date. By the terms of the trust deed, if this note was not paid when due, the entire principal might thereupon at the option of the company become immediately due and payable. There was, therefore, a separate and distinct contract for the forbearance of $65,000 to Dec. 31, 1886; and if the stipulated interest was not then paid, the forbearance was at an end, and the whole principal would become due.

The company at the same time collected and received $6,500 *eo nomine* as a bonus for the loan, over and above the stipulated interest of twelve per cent. *The payment of the first interest note of* $2842.19 *for the fixed period to Dec.* 31, 1886, *in addition to the bonus paid, fixed the character of the transaction absolutely.* The bonus was paid for the forbearance of the loan during the period of the first interest note, as clearly and distinctly as for any further time. If that interest note was not paid there would be no further time, but the $65,000 principal, with that interest note, would become due; the title of the mortgaged chattels would *ipso facto* pass to the company subject only to the right of re-

demption; the lands could be sold outright; and, in addition to all this, the bonus had *already been received*.

With such a contract in hand, the company charged, collected and received the bonus; and thereafter, up to the time of the trial of this case, *in seven different ways evinced its deliberate determination not to apply the usurious bonus to the reduction of either interest or principal*, viz:

1. By considering, in November, 1886, the propriety of crediting the $6,500 commission upon the first year's interest note, and then *deciding not to do it*, upon obtaining from its New Mexico officials security *to indemnify the company against this very suit*.

2. By *collecting the first interest note* in cash, without applying any of the commission to it, Dec. 31, 1886.

3. By taking *new and additional security* upon all the other original interest notes, without any deduction for the commission, March 3, 1887.

4. By *failing to credit the commission* at anytime before the suit was brought, although two more interest notes had meantime matured; whereby the principal could be declared due, and the title to the mortgaged chattels passed to the company, and the lands be sold out under deed of trust to pay the whole debt.

5. By directing foreclosure, and instead of crediting the bonus paid *trying to get McBroom to release his claim for usury*.

6. By *selling out the whole property* under the mortgages.

7. By *failing*, in this suit, or upon the trial, or at any time previous, *to offer to apply the commission* to the payment of principal or interest, or to credit it to McBroom in any way.

Granting that a *locus penitentiae* existed when this transaction occurred, the company has in all these ways deliberately *refused to repent*.

Therefore,

The time for repentance is gone.

There is not the slightest doubt that if the three years from Sept. 25th, 1886, for whose expiration the company's officials were so anxiously waiting, and for which they delayed foreclosure after failing to secure a release from McBroom, had been allowed to lapse before bringing this suit, the statute of limitations would have been promptly and successfully pleaded in bar of this action.

III.

There can be no Locus Penitentiae, where the Whole Contract was Unlawful.

The doctrine of *locus penitentiae*, as construed by the learned court, is that notwithstanding the usurious commission may have been collected, at a time when neither principal nor interest were due, yet that is first to be applied, contrary to the expressed intention of the parties, to the legal part of the debt; and no action will arise until the *legal* part of the debt has been paid in addition to the unlawful part. This is the idea contained in some of the decisions, which reason that the usurious payment may be in law applied to the legal portion of the debt, as stated in *Harvey vs. Ins. Co.*, 60 Vt. 209. And in the Pennsylvania case cited, *Brown vs. Bank*, 72 Pa. St. 209, it is said that this "accords with the general current of decisions upon the construction of usury laws, *wherever the contract is not itself declared to be void by the statutes.*"

If these and other cases cited were otherwise applicable, they all proceed upon the assumption that there is a lawful debt to which the usury may be applied, either by

the party or by the law. But the fatal objection to this theory, as applied to the case at bar, is that *there was no legal portion of this debt.* The whole contract was in violation of the statute, and those who engaged in it and invested their money upon it, took the same risk which every man does who engages in that which the law forbids.

If the contract by which the debt was attempted to be created was in violation of law, courts cannot say that there is a legal debt; nor can it be asserted that the law, in order to shield the usurer from the consequences of his usury, will apply payments, contrary to the repeated acts of the lender, to the reduction or discharge of a contract which by express provision of the statute is made a criminal offense.

Courts cannot hold this to be a legal debt, unless they are competent to declare lawful that which the legislature has said is unlawful, and are willing to concede to those who violate the law for private gain the same rights as those who obey it.

Usury laws are made for the protection of the borrower, and when violated, the parties are not *in pari delictu.*

Brown vs. McIntosh, 39 N. J. L. 22.

The provisions of the New Mexico law against the loaning of money for more than twelve per cent. interest, as contained in sections 1737 and 1738 above quoted, are clear and unambiguous. They are in substance two:

1. Makes the charging etc., of more than twelve per cent. by means of discount, or in any form, a misdemeanor, punishable by fine.

2. Allows recovery of double the excess when it has been charged and collected.

The Supreme Court of New Mexico concedes that if a contract in violation of the statute is void, there is no *locus penitentiae;* but holds that such is not its effect, chiefly upon the authority of a number of decisions of this Court arising under the National Banking act.

I invite the attention of the Court at the outset to the absolute difference, in language, principle and intent, between that act and the New Mexico law under which this suit is brought. The provision of the National Banking act, so far as applicable, is as follows: (Rev. Stat. U. S.)

"Sec. 5,193. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: provided such action is commenced within two years from the time the usurious transaction occurred."

The original banking act of Feb. 25, 1863, Sec. 46, in terms declared the contract void in case of usury, (12 Stats. 679), and was modified, among other things, by omitting that provision.

Bank vs. Dearing, 91 U. S. 29.

Upon the law as thus revised, this Court in 1879 held as follows:

"The statute under which the bank was organized, known as the National Banking act, does not declare the contract under which the usurious interest is paid, to be void."

"It denounces *no penalty* other than a forfeiture of the interest which the note or bill carries, giving to the

debtor the right to sue for and recover twice the amount of interest so paid. If we should declare the contract of indorsement void, and, consequently, that no right of action passed to the bank on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself. On what principle could this Court add another to the penalties declared by the law itself?"

Oats vs. Bank, 100 U. S. 249.

The United States law does not prohibit the charging of usury, nor declare it a crime, nor impose a penalty for so doing. It simply defines what the legal rate is; declares that if more is charged the interest shall be forfeited (*i. e.* no interest can be recovered); and in case more is paid twice the amount may be recovered back. It does not say: "You shall not charge usury." It only says: "You take your chances; if you charge usury you cannot collect interest; and if you receive usury, you are liable to pay back double."

Not so the New Mexico law: By it, the charging of usury is made a *misdemeanor, punishable by fine;* it is made absolutely unlawful; there is no choice or option about it. The law says: "You shall not charge usury; you become a criminal if you do; and besides this, what you receive as usury you are liable to repay two-fold." Now there may be cases in which the latter contingency never arises. The borrower, whom misfortune has driven to make a usurious loan, has paid no money; and therefore there is nothing to be recovered back, and the part of the statute authorizing such an action would cut no figure. The question would then arise, can the lender obtain the aid of a court of justice to enforce a contract which the

law has expressly prohibited? No such question arose, or could arise, in the national bank cases.

What is the legal effect of these provisions of the New Mexico law?

A contract is a promise from one to another to do or refrain from doing some lawful thing. Hence flows naturally the maxim: *Ex turpi contractu non oritur actio.* Every contract to be valid must be founded on a lawful consideration, and must promise to do a lawful thing. Without both there is no contract. From these elementary principles the conclusions of the text writers follow:

Whenever a statue provides a penalty for doing an act, the penalty implies a prohibition, and the thing is unlawful, though there be no prohibitory words in the statute.

Bartlett vs. Viner, Skinners Rep. 322, (Tyler on Usury, 374.)

1 Parsons on Contracts, 458.

Sedgwick on Constr. Stat., Sec. 71.

4 Am. & Eng. Encyl. of Law, p. 872, Sec. 49.

The principle is now settled that the statutory prohibition is equally efficacious, and the illegality of a breach of the statute is the same, whether a thing be prohibited absolutely, or only under a penalty.

1 Kent's Commentaries, 467.

Tyler on Usury, 374.

Every contract, be it by deed or without deed, is void, if it stipulate for the performance of an illegal act, or if it be founded upon an illegal consideration.

Smith on Contracts, p. 203, *et seq.*

No contract prohibited by express provision of statute can be enforced in any court of law; and an implied prohibition is equally fatal to its validity.

Ibid, p. 225 *et seq.*, 228.

If any part of the entire consideration of a promise, or any part of an entire promise, be illegal, whether by statute or by common law, the whole contract is void.

1 Parsons on Contracts, p. 458 *et seq.*, and cases cited.

Where a transaction is forbidden by statute it is void. The grounds of the proposition are immaterial. The imposition of a penalty by the legislature on any specified act or omission is *prima facie* equivalent to an express prohibition.

4 Am. & Eng. Encyl. of Law, p. 872, Sec. 49, and notes

No person, even so far back as the Middle Ages, was permitted by law to stipulate for iniquity. * * * If the contract grows immediately out of, or is connected with, an illegal or immoral act, a court of justice will not enforce it. Courts will allow the objection to be made even by the guilty party to the contract, for the allowance is not for his sake, but is grounded on general principles of public policy.

1 Kent's Commentaries, p. 466 *et seq.*

Broom's Legal Maxims, Sec. 704, 710, 713.

4 Am. & Eng. Encyl., 869, Sec. 14.

If the subject matter of an agreement be such that the performance of it would consist in doing a forbidden act, or be so connected therewith as to be a part of the same transaction, the law cannot command the parties to perform that agreement.

4 Am. & Eng. Encyl. of Law, p. 869, Sec. 43.

Broom's Legal Maxims, Sec. 713.

Every contract made for or about a thing prohibited and made unlawful by statute, is a void contract, although the statute does not mention that it shall be so. The fixing of a penalty imports a prohibition, and makes the prohibited act illegal.

Clark vs. Ins Co., 1 Story, 132

Hayden vs. Davis, 3 McLean, 276.

Where there is a loan, and an agreement to pay usurious interest for it, the law will not separate the contract to repay the principal and legal interest, from that to pay the usury, nor will it permit the parties to do so by any device. If a contract be in part for usurious interest, and it is made by two instruments, one promising to pay the principal, with or without lawful interest, and the other promising to pay the usurious interest as a principal with or without interest, it would seem that it is not this last promise alone that is void, but both, because both together form a contract which is tainted with usury.

3 Parsons on Contracts, 112, and cases cited in notes.

The matter is thus summed up by Tyler as applied to usury:

"And in other cases the statute declares what shall be the effect of the usury upon the contract or security, by making it valid for the true amount of the money loaned, or the debt secured, and void as to the usury. But it may be laid down as a general proposition, that where the statute does not expressly declare what shall be the effect of the usury, the usurious contract or security will be held to be void in the hands of the usurer himself, and cannot be enforced. So that, as to the original parties, when the transaction is found to be usurious, the question is settled. The contract or security is absolutely void, and can be available for no purpose whatever."

Tyler on Usury, p. 381.

We have thus established the following premises:

First. That imposing a penalty is the same as prohibition.

Second. That an act prohibited cannot be the foundation of a valid contract, but is an unlawful act.

Third. That if either the consideration or the thing promised is unlawful, the contract is void, and courts will not enforce it.

Fourth. That this is so, even if only part of the thing promised is unlawful, and part lawful, if the contract grows out of the unlawful part, or is connected with it so as to form one transaction.

Fifth. That the law will not separate the good from the bad, and give parties making illegal contracts the benefit of the good part only; but will leave them without the assistance of courts of justice.

Sixth. That when the statute is silent as to the effect of the prohibited usury, the contract is absolutely void in the hands of the usurer himself.

What is the effect of these propositions upon a usurious contract under the New Mexico statutes?

If money is loaned at an usurious interest, in violation of a statute making the charging or receiving of such interest a misdemeanor, and imposing a penalty for so doing, the whole contract is void for principal and interest, and will not be recognized in a court of justice for any purpose. No rights which courts will recognize can arise under it, or be transmitted to other parties, except they be purchasers *bona fide*, for valuable consideration, without notice of the usury. This is the settled doctrine of the United States Supreme and Circuit Courts:

The leading case is *Bank vs. Owens*, 2 Pet., 536, (1829) where the court held that a contract of loan by the U. S. Bank for a rate of interest prohibited by its charter was void, though not expressly declared to be so:

The court said:

"To understand the gist of the question it is necessary to observe that, although the act of incorporation forbids the taking of greater interest than six per cent., it does not declare void any contract reserving a greater sum than is permitted. Most, if not all, of the acts passed in England, and in the states, on the same subject, declare such contracts usurious and void. The question then is, whether such contracts are void in law, upon general principles. The answer would seem to be plain and obvious, that no court of justice can, in its nature, be made the handmaid of iniquity; courts are instituted to carry into effect the

laws of a country. How can they then become auxiliary to the consummation of a violation of law? To enumerate here all the instances and cases in which this reasoning has been practically applied, would be to incur the imputation of vain parade; *there can be no civil right where there is no legal remedy; and there can be no legal remedy for that which is itself illegal.*"

The opinion quotes with approbation numerous authorities affirming the principles of the text writers above cited, and showing that the question of the morality of the prohibited act has nothing to do with the case; that there is no distinction as to vitiating the contract between *malum in se* and *malum prohibitum;* and that "wherever the consideration which is the ground of the promise, or the promise which is the consequence or effect of the consideration, be unlawful, the whole contract is void."

This case has been followed by the Federal courts to the present day, so far as the doctrine above enunciated is concerned.

In *Bank vs. Waggoner*, 9 Pet., 399, (1835,) the court held that the transaction, which in *Bank vs. Owens* was by demurrer admitted to be usurious, was not so in fact, but otherwise the principle of that decision was in no wise controverted.

The court said:

"In the construction of the statutes of usury, this distinction between the reservation, and taking of usurious interest, has been deemed very material; for the reservation of usurious interest makes the contract utterly void; but if usurious interest be not stipulated for, but only taken afterwards, then the contract is not void, but the party is only liable to the penalty for the excess. * * * In construing the usury laws, the uniform custom in England has been, (and it is equally applicable here,) that to constitute usury within the prohibitions of the law, there must be an intention knowingly to contract for or to take

usurious interest; for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract upon its very face imports usury, as by an express reservation of more than legal interest, there is no room for presumption, for the intent is apparent; *res ipsa loquitur.*"

In *Fleckner vs. Bank*, 8 Wh., 353, the court had held that a contract was not void for usury in the hands of a stranger to the usury.

In *Dill vs. Elliot*, Taney, 233, (1853) Chief Justice Taney reviewed the whole subject upon principle and authority, and held that where a loan was made at a rate of interest forbidden by the constitution of Maryland, the entire contract was void and could not be enforced in a court of justice, notwithstanding the constitution did not in terms so declare. He says:

"This being the evident meaning of the language of this section, can a contract, by which a higher interest is taken or demanded, be enforced in a court of justice? It is true, the constitution does not say, in express terms, that such a contract shall be void, nor was such a provision necessary to invalidate it; for it is well settled, by a multitude of decisions, in this country and in England, that a contract to do an act forbidden by law is void, and cannot be enforced in a court of justice—we do not stop at present to refer to judicial decisions to support this proposition; many cases to that effect are cited in the opinion delivered by the Supreme Court of the United States, in the Bank of the United States vs. Owens, 2 Pet., 527; and we are not aware of any decisions, in any court, in which a contrary doctrine has been held."

He then refers at length to the decision of this Court in *Bank vs. Owens*, which he adopts as conclusive, showing that it applies to all cases where an act is prohibited by statute, although there is nothing morally wrong in the transaction; and he says, speaking of the money loaned:

"A court of justice cannot lend its aid to recover it,

because the contract for the loan is one entire thing, and consequently is altogether invalid or void, and it would be contrary to the duty of a court of justice to assist a party in consummating an act which the law forbids."

The Supreme Court of Maryland refused to follow this decision, holding that under the legislation of that State it was not sound.

Bandel vs. Isaac, 13 Md. 224.
Lazear vs. Bank, 52 Md. 78.

In *re Pittock*, 2 Sawyer, 416, (1873,) the question arose under a statute like that of New Mexico, in that it contains both a prohibition and a forfeiture by civil action; herein differing, just as the New Mexico law does, from the National Banking act, which contains no prohibition, but provides a civil forfeiture only.

The Oregon usury law provided, 1st: that one per cent per month might be charged, and no more; 2d: that no person shall directly or indirectly receive more for the loan of money; 3d: that if it appear in a suit brought on the contract that more has been contracted for, the entire debt shall be forfeited to the school fund. The loan in question was of $370, for which sum the borrower gave his note at the lawful interest, and at the same time, out of the money borrowed, handed back to the lender $20 as a bonus. A case more nearly like the one at bar, both on the law and the facts, could scarcely be desired. In a claim founded upon this note, the court delivered a lengthy opinion, in which it says:

"Is a contract to receive more than lawful interest illegal and void under this act? It prescribes the legal rate of interest; and declares that no more shall be contracted for or received. This is a prohibition, and any contract contrary thereto is illegal and void the same as if the act had expressly declared such to be the result."

After quoting from *Bank vs. Owens*, the opinion proceeds:

"But the usury act (section three) also affixes a contingent forfeiture or penalty to the violation of its terms in this respect, and counsel for creditor maintains that when such is the case, the ordinary effect of the prohibition is modified or mitigated so far as to leave the contract legal, subject to the penalty imposed for making it. The case mainly relied on in support of this position is *Harris vs. Runnels*, 12 How. 83."

This is the identical argument used by defendant in error in the case at bar, and the same case of *Harris vs. Runnels* is relied upon by counsel here. But the court held that the cases were in every material respect unlike, yet that under the law of *Harris vs. Runnels* the whole contract was void, saying:

"Let us apply the rule to the case at bar. The act under consideration contains a prohibition against contracting for or receiving more than a certain interest. If this were all, it is admitted that a contract contrary thereto would be totally void. Counsel for creditor claims that the act also contains a penalty, because it provided in section three for forfeiting the entire debt, under certain circumstances, upon which usurious interest has been received or contracted for.

"Let this be admitted, and still it follows that an act in contravention of the statute is void, unless the contrary appears from the act itself."

The court held the whole contract illegal for usury, and refused to allow a claim in bankruptcy based upon it.

In the same year, in *Tiffany vs. Boatman's Institution*, 18 Wall., 384, the precise question now before us arose in a usury case, and this Court announced its own settled doctrine, irrespective of the decisions of other courts, as follows:

"The defendant is by its charter authorized to lend money on interest, but is forbidden to exact more than eight

per cent. for the loan. No penalty is prescribed for transgressing the law, nor does the charter declare what effect shall be given to the usurious contract. The effect must, therefore, be determined by the general rules of law. The modern decisions in this country are not uniform on the question whether, if the bank take more than the rate prescribed, the contract shall be avoided or not on these general rules; nor is this a matter of surprise if we consider the growing inclination to construe usury as not to destroy the contract. It is, however, unnecessary to review these cases, or the earlier ones in England and this country, which uniformly hold that the contract is avoided; because this court has in the case of *The Bank of the United States vs. Owens*, 2 Peters, 527, decided the question. The bank in that case brought suit upon a promissory note that was discounted at a higher rate of interest than six per cent., which was the limit allowed by its charter upon its loans or discounts. The charter, like that of the Boatman's Institution, did not declare void any contract transcending the prescribed limit, nor affix any penalty for the violation of the law. It was contended in that case, as it has been in this, that a mere prohibition to take more than a given per cent. does not avoid a contract reserving a greater rate, and that when a contract is avoided, it is always in consequence of an express provision to that effect. But the court held otherwise, and decided that such contracts are void in law upon general principles; that there can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is illegal. Chief Justice Taney, in the Maryland circuit, as late as 1854, in a similar case, held similar views, and supported them by the decision in this case. *Dill vs. Elliott*, Taney's Circuit Court Decisions, 233. *It must, therefore, be accepted as the doctrine of this court, that a contract to do an act forbidden by law is void, and cannot be enforced in a court of justice.*"

That was in 1873. In 1891 the question came up again in a case analgous in principle, but with the very important addition that here a distinct penalty was prescribed for violation of the law; thus supplying the element wanting in

the last case. This was the case of *Miller vs Ammon*, 145 U. S., 421.

In this case, an ordinance prohibited the sale of liquor without a license, "under a penalty of not less than $50, nor more than $200 for each offense." The question was: Could a person selling liquor without such license recover the price of the goods upon the contract? The law imposed a distinct penalty for its violation; but was silent as to whether contracts made contrary to its provisions should be void or valid. That is the case at bar precisely; only the reasoning of the court will apply with greater force to our case than to that. There the law did not prohibit the selling of liquor absolutely, but only the selling of it without a license from the city, for which $250 was charged. The purpose of the law was evidently not to suppress the sale of liquor, but to make it a source of revenue to the city and subject to municipal regulation. It only said: "You shall not do this, except on certain conditions." The purpose of the New Mexico law was to suppress the charging of usury. No matter what expressions of courts or commentators may be found in favor of mitigating the severity of usury laws, there cannot be the slightest doubt as to the design of the New Mexico legislature in dealing with this subject. Its action was within the legitimate scope of legislative power, and with the expediency or propriety of it courts have nothing to do. It treated the exaction of usury as a public evil, and undertook to suppress it, just as it did the gambling tables. It did not license usury; nor did it provide any means by which it could be lawfully charged. It prohibited usury absolutely. It said: "*You shall not do this thing at all.*" Therefore the court cannot fail to see with how much stronger reason the decision in *Miller*

vs. Ammon applies to our case. I quote from the opinion as delivered by Mr. Justice Brewer:

"Two questions are presented: First, is the ordinance valid? Second, if so, can the plaintiff recover for liquor sold in violation of its terms? (p. 422–3). * * * Passing to the other (second) question, that must be answered in the negative. The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. Pollock's Principles of Contracts, p. 253 to 260; *Penn vs. Bornman*, 102 Ill., 523; *Alexander vs. O'Donnell*, 32 Kans., 608; *Gunter vs. Leckey*, 30 Alabama, 591; *Kennedy vs. Cochrane*, 65 Maine, 594; *Bank of the United States vs. Owens*, 2 Pet., 527, 539; *Pangborn vs. Westlake*, 36 Iowa, 546, 549; *Harris vs. Runnels*, 12 How., 79, 84. In *Bank vs. Owens*, this court said: 'There can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is itself illegal.' There are some exceptions to this general rule, and the last two cases furnish instances thereof. These exceptions are based upon a supposed intent of the legislature. In *Pangborn vs. Westlake*, it was thus stated how the exception should be determined: 'We are, therefore, brought to the true test, which is, that while as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly.' And in *Harris vs. Runnels*, this court, after noticing some fluctuations in the course of decision, and observing 'that we have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether the makers of it meant that a contract in contravention of it should be void, or that it was not to be so,' added: 'It is true that a statute containing a prohibition and a penalty, makes the act unlawful, and the same may be implied from a penalty without a

prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. *When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.*'

"In the light of these authorities, the solution of the present question is not difficult. By the ordinance, a sale without a license is prohibited under penalty. There is in its language nothing which indicates an intent to limit its scope to the exaction of a penalty, or to grant that a sale may be lawful between the parties, though unlawful as against its prohibitions; nor when we consider the subject matter of the legislation, is there anything to justify a presumed intent on the part of the lawmakers to relieve the wrongdoer from the ordinary consequences of a forbidden act. By common consent the liquor traffic is freighted with peril to the general welfare, and the necessity of careful regulation is universally conceded. Compliance with those regulations by all engaging in the tarffic is imperative; *and it cannot be presumed, in the absence of express language, that the lawmakers intended that contracts forbidden by the regulations should be as valid as though there were no such regulations, and that disobedience should be attended with no other consequence than the liability to the penalty.* There is, therefore, nothing in the language of the ordinance or the subject matter of the regulations, which except this case from the ordinary rule that an act done in disobedience to the law creates no right of action which a court of justice will enforce."

It is perfectly clear from this decision, that where an exception to the general rule is to be read into a statute, it must be founded on something in the statute itself to indicate a legislative intent to make such exception. *It is not from the silence of the statute* that such an intent is to be inferred. Nor is there anything in the subject matter of this statute, which deals with a thing prohibited without qualification, and made a misdemeanor under all circumstances and in all shapes, to indicate an intention of the legislature to look with complacency upon the violation of it, any more than in the numerous other cases where acts

not *mala in se* have been visited with penalties and prohibitions as offenses against public policy.

The court below, ignoring this entire line of decisions, concludes its opinion by saying: "If the legislature had intended to forfeit the entire debt, or to render the transaction void, nothing could have been easier than to have so declared."

The same argument was used in *Fowler vs. Throckmorton*, 6 Blackf. 227, under the Indiana statute of 1858, which prohibited under penalty of indictment and fine, the charging of more than ten per cent interest. The court held, both upon principle and the authority of *Bank vs. Owens*, *supra*, that the argument was unsound, saying:

"There is nothing in this argument. A contract for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute itself does not mention that it shall be so."

And after quoting at length from *Bank vs. Owens*, the opinion proceeds:

"The case just cited is also an answer to the plaintiff's objection to declaring the contract void as to the principal debt, though it be so as to the illegal interest. The statute in forbidding the taking of interest beyond a certain rate on a loan prohibits the making a loan on such terms; and the prohibition must apply, if at all, to the whole contract."

The Supreme Court of Illinois, in *Assurance Co. vs. Rosenthal*, 45 Ill. 85, states the law vigorously, as follows:

"When the legislature prohibits an act, or declares it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the court shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give the person or corporation the same rights in enforcing prohibited contracts as to the good citizen who respects and conforms to the law."

And in New York many strong decisions have been given on this precise point. I refer to two in Barbour because they contain excellent reviews of many others:

"The section is only prohibitory in its terms. It does not declare in so many words, that all such contracts shall be void. But this is not necessary. Every act done against a prohibitory statute is not only illegal but absolutely void, and the court cannot assist an illegal transaction, in any respect, or permit it to be set up as a protection. (*Hallett vs. Novion*, 14 John., 273, 290.) In *Griffith vs. Wells*, (3 Denio, 226,) the court held that though the excise law did not in terms prohibit the sale of strong or spirituous liquors without a license, nor declare the act illegal, but only inflicted a penalty upon the offender, yet that where a statute inflicts a penalty for doing an act, though the act be not prohibited, the thing is still unlawful; for it cannot be intended that a statute would inflict a penalty for a lawful act. All such contracts are void, though the statute does not declare them so. It is sufficient that the statute forbids. (Story on Con., secs. 613, 614, &c.)"

Barton vs. Plank Road Co., 17 Barb. 404.

Also,

Bank vs. Lamb, 26 Barb. 596.

Even if the question were *res nova*, and not concluded by all the foregoing decisions, and numerous others from various state courts that might be cited, it would be a complete answer to the court below to say: If it had been the intention of the legislature that the elementary rules of law should not apply to the construction of this statute, and that contracts made in violation of its prohibitions should nevertheless be valid, nothing could have been easier than to so declare.

Such was the fact as to the first usury law of the Territory, the act of Jan. 2, 1852; which provided that anyone charging over 12 per cent should forfeit the whole interest,

"and shall only be entitled to recover the debt due without any rate of interest whatever." (Comp. Laws, 1865, 594.) In very many states, where the legislatures intended to save the contract for the principal debt from avoidance under the usury laws, they have expressly so declared. This is the case in Alabama, Connecticut (act of 1849), District of Columbia, Illinois (act of 1857), Iowa, Kentucky, Massachusetts (act of 1826), Missouri, Mississippi, Nebraska, New Hampshire, New Jersey, South Carolina, Tennessee, Texas, Virginia, West Virginia. Hence it is perfectly logical to say that if the New Mexico legislature had intended that a contract made in violation of one of its laws should, contrary to the general rule on that subject, be valid in whole or in part, it would have said so, as was done in those states.

But there is one intent that cannot be misunderstood, which goes behind all these refinements;—and that is the intent that *the law should be obeyed*.

The intent was that the money lender should not exact usurious interest.

The object of the law was to prevent the charging of usury, and not merely to license it on paying a fine. It was made to be observed, and not to be violated.

If the money lender who takes usury is only liable at most to a $100 fine, and loss of double the interest collected, he can safely take the chance of violating the law. In most cases the debtor will pay anyhow, as a matter of honor, or in expectation of future accommodation. So that if the lender knows that in the exceptional cases the law will assure him the return of his principal and legal interest anyhow, he can well afford to go on charging usury, and risk the payment of the fine and double the usury in those

cases—treating such losses as mere *license to enable him to violate the law.*

The law never intended to lend its assistance in making it safe and profitable for men to violate it. .

Something was said below about the hardship of allowing recovery of a forfeiture in such cases as this. In view of the ample and ironclad security taken by the Scotch company for its loan, it is not easy to see where the hardship is. But if there were, that is precisely what the law intended.

There is one simple and easy way to avoid all hardship, and that is to obey the law.

Respectfully submitted,

FRANK SPRINGER,

Counsel for Plaintiff in Error.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

October Term, 1893.

TERM No. 1028.

WILLIAM H. McBROOM,
Plaintiff in Error,
vs.
THE SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY OF NEW MEXICO (LIMITED),
Defendant in Error.

In Error to the Supreme Court of the Territory of New Mexico.

Brief and Argument for Defendant in Error

ANDRIEUS A. JONES,
Counsel for Defendant in Error.

EUGENE A. FISKE,
Of Counsel for Defendant in Error.

CARRUTH PRINTER AND BINDER EAST LAS VEGAS

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

We have read with interest the very carefully prepared brief and argument filed by counsel for the plaintiff in error in this case. He certainly deserves great credit for the remarkable ingenuity which he has exhibited in blending irrelevant and incompetent testimony with *selected por-*

tions of competent testimony, so as to present a "*statement*," at once calculated and perhaps intended to create a feeling of indignation and resentment towards the defendant in error. The trial court permitted, over objection and exception of defendant, a large amount of so-called testimony to be introduced, which we submit related to transactions and propositions which were never consummated and events which occurred long after the institution of the suit; and counsel for plaintiff by weaving into his *statement* and argument this irrelevant matter, which in the trial court could serve no purpose except to prejudice the jury, has made it necessary for us to present, without embellishment, a statement of the case which this court is called upon to decide.

STATEMENT.

The defendant, The Scottish Mortgage and Land Investment Company of New Mexico (Limited), is a corporation organized under the laws of Great Britain. Its home office is located in Glasgow, Scotland, and its board of directors reside there. One of the objects of the company is the lending of money on real and personal securities. The articles of association provide (Rec. p. 61) that:

"The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may do all the acts mentioned in the memorandum of association, and may exercise all such powers of the company as are not by the companies' acts, 1862 to 1880, or by these articles, required to be exercised by the company in general meeting. * * * * * The directors are empowered to appoint a manager or managers, and secretary or secretaries, and other necessary officers, except as after provided in the

case of auditors, with such powers and duties as they may from time to time prescribe. The same person or persons may hold both offices of manager and secretary." * *

"104. The directors may appoint one or more advising boards in America. * * * 105. The directors may from time to time make such agreement with, confer such powers and duties on, give such directions to, and make such regulations for the conduct of business by the advising boards, as they may judge expedient and the members of such advising boards shall in every respect conform to any such agreement, directions or regulations."

After the organization of the company, a board of directors was elected and Carson & Watson were appointed managers and secretaries, and all of these officials resided in Glasgow, Scotland. An advising board consisting of Jefferson Raynolds, Charles Blanchard and William A. Vincent, was appointed and the members of this board resided in Las Vegas, New Mexico. In October, 1882, George J. Dinkel and Clinton R. Browning were appointed local managers or agents with headquarters in Las Vegas. Afterwards, for the purpose of complying with the laws of New Mexico permitting foreign corporations to do business in the territory, on the 23d day of June, 1883, the company filed in San Miguel county, New Mexico, its articles of association, a copy of the companies' acts under which it was incorporated, and a certificate designating George J. Dinkel as the agent of the company, on whom process might be served. Especial attention is called to the fact that the articles of association provided that "the business of the company shall be managed by the directors." It is true that the company had a president, but his duties seem to have been limited to presiding at meetings of the board of directors. The managers and secretaries simply attended to the keeping of accounts and min-

utes and conducting the correspondence of the company, while the making of loans, especially large ones, was done under the immediate supervision of the board of directors. The company had no general officers or agents save the board of directors. When Dinkel began his correspondence with the company in regard to the McBroom loan his letters were always referred to the board of directors before any reply was sent. This clearly appears from the record. (Rec. pp. 71-92.) The first letter which Dinkel wrote in regard to the McBroom loan was considered by the board and the minutes of the meeting appear in the record as follows:

"Mr. Dinkel's letter of the 5th February, with accompanying letter from McBroom, regarding loan of $65,000, was submitted, but the board considered the loan too large a one, and instructed the managers to inform Mr. Dinkel of their decision by letter instead of by cablegram, as requested by him." (Rec. p. 72.)

August 5th, 1886, Carson and Watson close their letter to Dinkel with the statement:

"Please note that we cannot always reply at once, to your wires. Members of the board must always be consulted, and this frequently takes some days to accomplish, more especially in summer time." (Rec p. 76.)

Dinkel was in no sense a general representative or agent of the company. His powers were exceedingly limited. Mr. Carson, who was present at the trial of this case, when questioned as to the powers and duties of Dinkel, testified as follows:

"His powers and duties as general manager were to arrange for the lending of money in New Mexico, and he was authorized in connection with the advisory board, with the approval of the advisory board in Las Vegas, to make loans up to a certain amount; I think it was $15,000, without consulting the home board.

"Q. Then he had no power to make loans, even up to $15,000, without consulting the local advisory board?

"A. No sir. He should always take the advisory board in with him in all matters." (Rec. p. 92.)

Mr. Vincent testified (Rec. p. 96) that:

"The company never intended, under any circumstances, to loan more than $30,000 to any one individual or corporation. I also knew that Mr. Dinkel had no authority to loan to exceed $15,000, except by the express authority of the directors at the home office in Glasgow."

Dinkel never had any authority to make loans to ranchmen on cattle, until the board had taken special action in reference to that branch of business. His authority was then limited by the terms of a letter from Carson & Watson, dated 5th August, 1886, which says:

"As we indicated in our last, the board finally decided to sanction the loaning of money to cattlemen on the security of their ranches and cattle, at not less than twelve per cent. and agree that you might proceed to do this without reference to the home board, in all cases where the loan would not exceed $15,000, but any proposal over that amount to be first submitted to the board here." (Rec. p. 76.)

The company retained Mr. Vincent as local legal adviser, whom Mr. Dinkel was required to consult, and Dinkel had no authority to disregard the instructions of the local counsel or do any act not in compliance with them. This appears by the testimony of Mr. Carson. (Rec. pp. 92–93.)

"Q. State whether or not the company, at the time of this transaction, had a local attorney employed?

"A. The company retained Mr. Vincent as local legal adviser.

"Q. State what the duties of Mr. Vincent were as local legal adviser?

"A. The duties of Mr. Vincent were to examine the titles for business that was passed upon and approved of

by the local advisory board or the home board, and to advise Mr. Dinkel, in all legal matters, and keep the company right here; to keep all the transactions perfectly legal and clear. The parties at home could not know the local law here, and they relied upon the legal advisers here to keep them within its limits.

"Q. Were Mr. Dinkel's actions in these transactions for the company subject to the approval of Mr. Vincent as solicitor of the company?

"A. They were.

"Q. State, Mr. Carson, whether or not all business to be carried out by Mr. Dinkel, was to be done by the approval of the local solicitor for the company, so far as the legal rights of the company were concerned?

"A. Yes, sir, that was the object of our having a solicitor retained here, to keep us right in legal matters.

"Q. State whether or not, in any transaction which your home office should instruct Mr. Dinkel to carry out, whether he would be authorized to carry out these transactions if the local solicitor disapproved of them as being illegal?

"A. No, sir, certainly not."

The foregoing clearly shows that Dinkel was a mere agent of the defendant company, and his power was extremely limited. He could not make loans to any extent without the permission of the local advisory board and the local legal adviser, and then only to the amount of $15,000. The lending of larger sums was expressly reserved for the board of directors in Scotland. The articles of association providing for this method of management of the affairs of the company was of record in San Miguel county, New Mexico, where McBroom resided, and he must be presumed to have had knowledge of it. That he did know that Dinkel had no authority to make such a loan as McBroom wanted is conclusively proven by McBroom's own testimony. McBroom says:

"He (Dinkel) asked me what was the amount I

wanted, and I told him I needed about $65,000. He says: That is more than our company authorizes me to loan, they would not loan only from $25,000 to $30,000; that is what they have authorized me to loan to an individual, and for that reason he said he would not be able to let me have it." (Rec. p. 13.)

Counsel for plaintiff in error seems to consider that the contract of date October 19, 1882, between the company and George J. Dinkel and Clinton R. Browning has a considerable bearing upon this case and has quoted and italicized one of its provisions that "*all commissions on loans by the company and all bonuses or penalties payable by borrowers from them in respect to such loans, shall belong to the company.*" (Rec. p. 54.)

It will be observed, however, that this contract was made in 1882, and the law under which this suit was brought was not passed until April 3d, 1884 (Session Laws N. M., 1884, p. 192); and that at the date of that contract of 1882, and for the ten years prior thereto, such a bonus as therein provided for would have been without penalty in New Mexico. The N. M. act of January 31, 1872 (Session Laws N. M., 1871–2., p. 30), provided no statutory limitation as to the rate which might be charged in written contracts for the loan of money, and that act remained in force unchanged until the act of March 2, 1882 (Session Laws N. M., 1882, p. 43), which provided as to such loans, "that in written contracts for the payment of money, it shall not be legal to recover more than twelve per cent. interest per annum." (*Milligan vs. Cromwell*, 3 N. M., 330.) As disclosed by the record, too, this contract of 1882 was not in force in 1886 when all the transactions complained of in this case occurred. By the contract of 1882 the managers of the company in New Mexico, were not George J. Dinkel only,

but Dinkel and Clinton R. Browning at a compensation of $2,500 per annum as fixed salary and certain commissions or earnings. (Rec. p. 54.) This contract terminated by the death of Browning prior to 1886, and thereupon Dinkel alone became, and for all of 1886 was manager for the company at a fixed salary of $5,000 per annum under another and special agreement made by the company with Dinkel after Browning's death. (Rec p. 94.) As all the transactions complained of in this case occurred in 1886, we fail to see for what purpose the contract of 1882 is a part of this record, unless it was that the Supreme Court of the Territory in deciding this case overlooked the record and facts as above pointed out and based its conclusion as to the liability of the defendant in error upon the portion of the contract of 1882 quoted by counsel in his brief as above stated. (Rec. p. 152.)

The foregoing, we believe, states fairly and accurately the method of conducting the business of the defendant company; also the relationship which existed between Mr. Dinkel and the company, as well as the position which the local advisory board held at the time of the application by McBroom for a loan of $65,000.

Counsel for plaintiff sets forth at length in his brief a large amount of correspondence between Dinkel and the company beginning February 25th, 1886, and extending to a period long subsequent to the consummation of the loan to McBroom, and all this correspondence, as well as the detailed action of the board of directors of the company, which occurred prior to the 23d day of September, 1886, we respectfully submit occurred anterior to the transaction which was finally consummated between the company and

McBroom, and has no legal connection with such transaction. On the 23d day of September, the company telegraphed Mr. Dinkel as follows:

"McBroom. The board sanction a loan of thirty thousand dollars first mortgage ten per cent., or sixty-five thousand dollars twelve per cent. Decline quarter interest, but get best cash bonus possible instead, or get third party to buy quarter interest and pay us."

This telegram conveyed to Mr. Dinkel the first intimation that the company would loan to McBroom the sum of sixty-five thousand dollars upon any terms. At the time Mr. Dinkel received the telegram he had broken off all former negotiations with McBroom. In a letter from Mr. Dinkel to the company, dated October 6th (Rec. p. 85), Mr. Dinkel says:

"Mr McBroom left my office at about 2:30, when I went over to the west side to attend to some business, and passing the telegraph office about 3:30, I went in to see if anything had been received, and they had just taken your wire from the instrument. I waited and took it with me and found it sanctioned just such a loan as McBroom had proposed, which I had positively declined, thus making it all but impossible for me to introduce the matter to him with any hopes of its being accepted, and in this embarrassed condition I sought the aid of Mr. Vincent, as Mr. Blanchard and Raynolds were away. Had the wire come to hand an hour sooner, I could have made a clear $8,500 commission, $6,500 of which was to be cash and the $2,000 in two notes of $1,000 each, at six per cent., running eighteen and thirty-six months, interest payable half yearly. I proposed to Mr. Vincent that if he could now induce McBroom to again make the same proposition he would see that it would be carried out, and I would give him half that would be made by it, and after a long discussion McBroom made the proposition in writing, and it was at once closed up. The cash commission was $6,500, and Mr. Vincent charged him $400, total $6,900, one-half of which was to be, and is now Vincent's, and the balance I have. Mr. Vincent says that if the company took any portion of

this commission it would be liable to the borrower for double the sum, which he could, and under the present circumstances no doubt would, recover the same from the company, by a suit in the district court, as that is the penalty provided for by the usury law last enacted, and it would therefore be very risky for the company to accept any of it."

This statement of Mr. Dinkel's is substantiated by the testimony of Judge William A. Vincent (Rec. p. 97) where Mr. Vincent details the conversation between himself and Mr. Dinkel in regard to the McBroom loan. Judge Vincent says:

"I said to him (Dinkel), You understand, Mr. Dinkel, that the company cannot take the bonus. He said the bonus was not to go to the company; that the bonus was to be paid to him for his services for McBroom in inducing the Scotch company to change the whole order of its doing business, to depart from its principle not to loan more than $30,000, and to depart from their practice theretofore, in not loaning on cattle. He said he had been working with McBroom for three years and he thought it only fair he should be paid for it. He asked me if he had a right, under such circumstances, to take the bonus that had been agreed upon, that McBroom should pay him for such services. I told him in my opinion he had."

In this conversation between Dinkel and Vincent, who was a member of the advisory board as well as the local counsel for the company, we have the first inception of the transaction as finally consummated. If Dinkel had ever considered prior to that time the taking of a bonus for the company, such a consideration became a thing of the past as soon as he had consulted the attorney for the company and ascertained that the company could not legally take a bonus.

After this conversation between Dinkel and Vincent, Mr. Vincent approached McBroom upon the subject of making the loan and induced McBroom to make a propo-

sition to Mr. Dinkel in writing. This McBroom did, and the proposition appears in the record at page 98, and is as follows:

"LAS VEGAS, New Mexico, Sept. 23, 1886.

"GEORGE J. DINKEL,

"Dear Sir: I desire to make the loan of sixty-five thousand dollars, $65,000, I have been talking to you about, and for the term of six years, interest at rate of twelve per cent. per annum. Interest payable first of January of each year; after I have carried this loan two years would like privilege of giving you three months' notice, and by paying a bonus of one thousand dollars, you allow me to take up all the loan and pay the said one thousand or part of the loan and proportional part of the one thousand.

"I am willing to give *you* six thousand five hundred in cash, and two thousand in notes, in two notes, one payable in eighteen months, six per cent, payable semi-annually; one in three years, six per cent, payable semi-annually; you to pay your lawyer's fee. This proposition to be accepted or rejected at once. If accepted I will remain in the city several days, till the loan is completed. If this proposition is not accepted I will take the money where it is offered me elsewhere.

"Respectfully,

"W. H. MCBROOM."

Mr. Vincent then carried this letter to Mr. Dinkel and after some discussion between Mr. Dinkel and Vincent, Dinkel endorsed on the back of the proposition the following:

"LAS VEGAS, Sept. 23rd, 1886.

"W. H. MCBROOM, ESQ., Las Vegas, N. M.:

"Dear Sir: I accept the above proposition, provided you pay Judge Vincent his fee for examination of title, and preparing of papers, and date notes August 20th, 1886, as you agreed to do to-day. This to be without prejudice to the contract for one-quarter interest, unless it is accepted.

"GEO. J. DINKEL."

Mr. Vincent then carried the proposition back to Mr. McBroom, who wrote on it:

"Dear Sir: I hereby agree to and accept the above proposition. W. H. McBroom."

This written proposition and acceptance, we submit, constitutes the entire contract in reference to the loan previous to the execution of the notes and mortgages.

Mr. McBroom testifies (Rec. p. 45):

"Q. You did not have any verbal conversations with Dinkel in regard to it (the loan) did you, after you made that written proposition and before Vincent told you it was accepted?

"A I don't remember that I did have any talk with him."

The notes and mortgages were then executed by Mr. McBroom and delivered to Mr. Dinkel. Checks to the amount of $65,000 were made out by Mr. Dinkel and delivered to Mr. McBroom. One of these checks amounted to $6,500 and was endorsed by McBroom and delivered to Mr. Vincent, who had the same placed to his credit in the bank, and subsequently gave checks to Mr. Dinkel for one-half of the amount. (Rec. pp. 17 and 18.)

It is not even claimed by the plaintiff that the company ever received any part of this bonus, and if such were insisted upon, the matter would be forever settled by the very positive testimony of Mr. Carson. Mr. Carson was asked (Rec. p. 94):

"Q. State whether or not the defendant in this case has ever received any part of the bonus for making this McBroom loan."

To which he answered:

"A. The company, the defendants, have never received a single penny of any bonus."

Neither Dinkel nor Vincent ever offered uncondition-

ally to turn over to the company any part of this bonus which they had received. In the letter which Mr. Dinkel writes of date October 6th, 1886, narrating how the McBroom matter had been closed up, says in regard to his part of the bonus, the following:

"I have made up my mind, however, that the company should have the commission, or that part I control, and in order to consummate it, I propose to give my note to the company for the $3,450, for three years without interest (as I should be entitled to at least the use of the money free for that time), at which time I can find some way to pay the same to the company without any one noticing it, so the risk would be reduced to a minimum. I have only spoken of this to Mr. Blanchard, and he, I am glad to say, approves of the same, although he would like to have had me make the commission myself, as I have been working with him (McBroom) now for three years, and this is the only time I have been in position to be paid for what I had done for him. However, I will waive any interest I may have in this commission, and pay it to the company at the end of three years, *upon condition that my agreement with the company for the year* 1886, *be continued for other three years*, taking in the years 1887, 1888 and 1889." (Rec. p. 85.)

This letter conveyed to the board of directors the first intimation that the taking of a bonus was in violation of any law of New Mexico, or that Mr. Dinkel and Mr. Vincent had even contemplated the taking of a bonus for the company should the same be found illegal, or that they would take a bonus for themselves, under any circumstances.

The board of directors then pursued the only course which upright and honorable men could pursue, and repudiated the action of Dinkel and Vincent in taking the bonus. The record of their action as copied from the minutes is as follows (Rec. p. 86):

"The board carefully considered the matter referred to in Mr. Dinkel's letter of 6th October, and instructed Mr. Carson to write Mr. Dinkel to the effect that when the cablegram authorizing the loan to McBroom was sent, the board had no idea that their proposal, if carried out, would be any infringement of the usury laws. That the board did not see their way to accept Mr. Dinkel's proposal as to the disposal of the one-half of the bonus over which he had control, and that the board were disposed to think Mr. Vincent's services in the matter of the negotiation should have been freely granted Mr. Dinkel without extra remuneration."

This action of the board was followed up by a long letter from Messrs. Carson & Watson to Mr. Dinkel, dated 12th November, 1886, (Rec. p. 87,) in which the following language was used:

"The portion of your letter to us of the 6th ultimo, dealing with this matter, (McBroom loan,) was the subject of very long and careful consideration by the board at their meeting on Monday last. As you would no doubt surmise, when considering the terms upon which the board were willing to make the loan, the board had not before them the usury statutes, and were entirely ignorant that the proposal they made, if carried out, would have been struck at by the statutes, but they have since had its provisions under consideration, and are of the opinion that the acceptance by the company of the cash bonus as such, would have been illegal, and under these circumstances they do not feel that they could avail themselves of the proposition you have made. * * In conclusion the board desire us to express generally as a matter of principle, its disapproval of the officials of the company, or its advisory board, profiting in any shape through the transactions of the company, other than in the ordinary way, or by exceptional remuneration specially sanctioned by the home board."

On November 20, 1886, Messrs. Carson & Watson again wrote to Mr. Dinkel as follows:

"Since we wrote you last, our solicitor, Mr. Muirhead, who was not present at the last meeting of the directors, has been carefully studying and considering the usury law,

with the result that he has considerable doubt whether you, yourself, or Mr. Vincent are not so intimately connected with the company in your official capacity as manager and law agent respectively, and as ex-officio members of the advisory board, as to bring you under the class of persons who may not receive any bonus from a borrower, and under these circumstances the board, at a meeting today, again had the matter before them, and have come to the conclusion that the matter cannot be left in its present unsatisfactory state. They consider that the $6,500 received should be paid to the company as a payment on account of the first year's interest due by McBroom, and that McBroom should be notified that this has been done, and a proper receipt given him for it, so that the company, yourself and Mr. Vincent, can be placed in clear and legal position."

The contents of this letter were communicated by Mr. Dinkel to Mr. Vincent, December 13th, 1886. Instead of complying with the request of the company, Mr. Vincent positively refused to do so, and wrote a long letter to Mr. Dinkel in which he gives it as his positive opinion that the transaction as consummated was not an illegal one so far as the company was concerned. (Rec. p. 90.) In this letter Mr. Vincent uses the following language:

"The suggestion that I should return to the company as a payment upon McBroom's interest for the first year, the money I received from you for inducing McBroom to borrow the money from the company, is a great surprise to me. You know very well that when you came to me and offered me one-half the bonus if I would persuade McBroom to take the money from the Scotch company, that he had fully resolved to take the money from other parties, who had offered it to him upon more advantageous terms, and seemed determined that the Scotch company should not have the benefit of the loan. * * *

"You must believe, as they would at the home office, if familiar with all the facts, that in view of the peculiar and particular circumstances surrounding the case, that I fairly earned all I received, as you did all you received. The transaction was legitimate and in good faith; the company has lost nothing and will not, by that matter, and it

seems to me that the directors go entirely out of their province when they ask either one of us to pay the money into the company to the credit of McBroom. In effect it is a present to McBroom, of so much money, and I do not feel disposed or able to make presents to McBroom. * * * There is nothing in the suggestion of Mr. Muirhead that the company has been guilty of usury in the matter, because of our official relation to the company, and I am willing at any time to give the company a certificate to that effect. You will recollect that at the time the loan was made, we discussed the matter, and I called your attention to a case reported in 113 Illinois, which is conclusive upon the subject. If that bonus had been received by us as officers of the company, for the benefit of the company, it would have been usury, or in other words, if it had been paid to us as a mere subterfuge, and had been by us paid to the company, it would have been usury, or if the company made a custom of remunerating you for your services, by compelling you to charge a bonus on all loans, and that was your sole compensation, so that the company in that way only obtained your services by compelling the borrower to pay you, that would be usury. As it is, the company is free and clear from all taint of usury in the McBroom transaction, and I decline to make McBroom a present of money I labored so hard to earn."

This letter was sent by Mr. Dinkel to the directors in Scotland, and they did the only thing which they could do under the circumstances, and that was to let the matter drop upon the receipt of a certificate of Mr. Vincent that the company was not legally liable under the usury laws of New Mexico.

It is insisted by counsel for plaintiff that the company was culpable, because it did not credit, or did not itself refund to Mr. McBroom the $6,500 paid to Dinkel and Vincent.

The company did everything it could to right the wrong which Dinkel and Vincent had done to McBroom, but not having received any part of this bonus, it seems to

us that no reasonable man could have expected the company to pay back to McBroom something which it had never received from McBroom. In addition to this it may be said that McBroom was not in fact injured, as he had previously offered a large bonus to various other parties in the event that they secured a similar loan for him.

The company, in good faith, parted with its $65,000, no portion of which, or the interest, has been returned to it, except the first installment of interest, amounting to $2,842.19.

This was the situation of the parties September 24, 1889, when the plaintiff filed his declaration in this suit. It is true that McBroom testified that subsequent to the bringing of this suit that the company had foreclosed its mortgages, and sold all of his cattle and real estate. This testimony was vigorously objected to at the time it was offered, but was allowed to go to the jury, and this action of the trial court was one of the matters which we assigned as error and for which we insisted that the judgment should be reversed. If anything subsequent to the institution of this suit were properly admissible in evidence, the defendant in the case could have shown that the land described in its trust deed had depreciated in value to such an extent that it is not worth one dollar ($1.00) per acre; and that the cattle instead of increasing in value or numbers, have diminished in value at least three-fourths, and have died to such an extent that the original number are not upon the range. And it might also be shown that the sales which McBroom referred to were subsequently abandoned by the company, and a suit is now pending for the purpose of foreclosing the mortgages, and in this suit the company, for

the purpose of avoiding all question as to its liability on account of the taking of the bonus by Dinkel and Vincent, has generously offered to credit Mr. McBroom with the amount so paid by him to Dinkel and Vincent.

These matters, however, which have occurred subsequent to the institution of the suit by plaintiff, we insist have nothing to do with this case, and have referred to such matters only for the purpose of showing the gross error of the trial court in permitting anything to go to the jury which occurred subsequent to the institution of the suit.

The declaration filed by plaintiff charges:

1. That on the 20th day of August, 1886, the plaintiff below made and delivered his promissory note to defendant below, for $65,000, payable six years after its date, with interest at twelve per cent. per annum, said interest being evidenced by six notes of even date with the principal note, one of said interest notes being for the sum of $2,830.10, due December 31, 1886, five of said interest notes being each for $7,800, and due and payable on the 31st of December 1887, 1888, 1889, 1890, 1891 and 1892, respectively, and one of said interest notes being for $4,965, due August 20, 1892; that said defendant exacted, required and charged of said plaintiff in consideration of the loan mentioned and for discount and commission the sum of $6,500 in excess of the twelve per cent. interest specified in said principal note, which sum of $6,500 was on the 25th of September, 1886, paid by plaintiff to defendant, pursuant to such requirement, and charged, collected and received by said defendant by way of unlawful discount, commission and agency, for said loan of $65,000.

2. That on the 25th of September, 1886, plaintiff bor-

rowed $65,000 of defendant, and made his promissory note therefor, payable six years after its date, with interest at twelve per cent. per annum, and that plaintiff was then and there required by defendant, in consideration of the said loan, to repay to defendant $6,500, as discount and commission, in addition to said interest at twelve per cent., which said sum of $6,500 was afterwards, on the 25th of September, 1886, and in pursuance of such requirement, and by way of unlawful commission and agency, paid to defendant and afterwards, on the 31st of December, paid said defendant as interest on said loan from August 20, 1886, to December 31, 1886, the further sum of $2,830.10.

3. The plaintiff on the 20th of August, 1886, made and delivered to defendant a promissory note for $65,000, bearing interest at twelve per cent. per annum, and afterwards, on September 25, 1886, by means of a certain subterfuge in the nature of discount, commission or agency, the defendant unlawfully charged, collected and received from plaintiff $6,500 as for commission and discount, upon the sum of $65,000, mentioned in said promissory note, and afterwards, on December 31, 1886, did charge, collect and receive from plaintiff as interest on said sum of $65,000 from August 20, 1886, to December 31, 1886, the further sum of $2,830 10, the said sums amounting to $9,330.10, being a higher rate of interest than twelve per cent. per annum upon said sum of $65,000, "for the period above mentioned."

On the 31st of October, 1889, defendant plead to this declaration the general issue and the statute of limitations of three years, and thereafter on the 11th of November, 1889, plaintiff joined issue as to the first and filed replication as to the second plea. Upon the trial of said cause

plaintiff withdrew all claim except for double the sum of $6,500 mentioned. On the 29th and 30th of April and 1st of May, 1891, said cause was tried by a jury, and a general verdict rendered against defendant below for $13,000, together with a special finding of facts.

Thereafter the case was duly removed by writ of error to the Supreme Court of the Territory of New Mexico, where the judgment of the trial court was reversed.

The plaintiff has now brought the case into this court and has specified various reasons in his assignment of errors why the judgment of the Supreme Court of the Territory of New Mexico should be reversed, and the judgment of the trial court affirmed. One of the reasons which constitutes the 6th assignment of error is "that the said supreme court upon the grounds aforesaid only, reversed the judgment of the District Court for the Fourth Judicial District of the Territory of New Mexico in and for the county of San Miguel; whereas the rulings and decisions of said District Court upon the said questions were not brought before said Supreme Court for review by proper exceptions of assignments of error." This position we do not deem to be tenable.

The case of the defendant in error was properly brought into and reviewed by the Supreme Court of New Mexico, and the plaintiff in error is by his acts estopped from denying that the same was there properly reviewed.

Sec. 2058 Compiled Laws of New Mexico expressly provides "if the giving or refusal" (of instructions) "be excepted to, the same may be without any stated reasons therefor, and all instructions demanded must be filed and shall become a part of the record."

Sec. 2190 Compiled Laws of New Mexico provides

that "The Supreme Court in appeals or writs of error shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the District Court or give such other judgment as to them shall seem agreeable to law."

Sec. 4 of the act of January 5, 1889, provides that "it shall be the duty of the Supreme Court to look into all the rulings and decisions of the court which may be apparent upon the record, or which may be incorporated in a bill of exceptions, and pass upon all of them, and upon the errors, if any shall be found therein in the rulings and decisions of the court below, grant a new trial or render such other judgment as may be right and just and in accordance with law."

Session Laws N. M. for 1889, p. 4.

In view of these statutes the contention of plaintiff in error (p. 15 of his brief) that "no exception was taken to the giving or refusal of instructions sufficient to bring them before the Supreme Court of New Mexico for review," would seem to need no further comment. We add however that by stipulation (Rec. p. 136) in the trial court plaintiff in error consented that this record of which he now complains should be signed and sealed by the trial judge "as the record on which the judgment in said cause may be reviewed by the Supreme Court," etc.; that errors were duly assigned in the Supreme Court of New Mexico and joined in without objection under Sec. 2182 Compiled Laws of New Mexico, and the case thus made, including the exceptions to the instructions of the court, duly presented, argued, submitted and passed upon; and, if this contention could ever have been in force, plaintiff in error has long since concluded himself by his submission of his case to the Supreme Court

of New Mexico, from availing himself of any merit there may have been in his contention if it had been availed of at the proper time.

It will be observed, too, that the bill of exceptions complained of shows that *each* instruction given by the court was duly excepted to (Rec. p. 129).

As matter of fact, also, all the questions in this case were properly raised on review by the refusal of the court to instruct the jury to find for the defendant at the close of all the testimony, and the exception then taken. This motion was not a "mere general reference to the former motion" (Rec. p. 65), but the motion was based specifically upon all the reasons set forth in said former motion, with numerous others, and its refusal duly excepted to (Rec. p. 122), and such refusal duly assigned as error in the Supreme Court of New Mexico (Rec. 139).

The cases of this Court cited on page 15 of brief for plaintiff were all decided under rule 4 (formerly rule 38) of this court, which by its terms is limited to the Circuit and District Courts of the United States.

Various other errors have been assigned, but it seems to us that the whole case is brought before this Court for review, and this Court is called upon to decide whether the Supreme Court of New Mexico erred in reversing the judgment of the trial court on the *whole case as presented to it;* and, in substantiation of our belief that the Supreme Court did not err in so doing, we present the following:

ARGUMENT.

The facts proven show that the consummated transaction as to the defendant was not usurious.

This Court in the case of *Bank of U. S. vs. Wagner* 9, Pet. sec. 97, has well said:

"That to constitute usury, within the prohibitions of the law, there must be an intention knowingly to contract for or take an usurious interest. * * * Where the contract on its face is for legal interest only, there it must be proved that there was some corrupt agreement or device or shift to cover usury and that it was in the full contemplation of the parties. * * * There must be an intent to take illegal interest."

In the case of Condit vs. Baldwin, 21 N. Y. 222, the same proposition is stated as follows:

"The real parties to the transaction are the plainliff and the defendant, and to render the transaction usurious there must have been a corrupt agreement, an *aggreatio mentium*. It is not sufficient that the defendants intended to make it usurious. * * * The intention to take usury must have been in the full contemplation of the parties, not of one party, but of both, to the transaction."

Now, let us examine the record in this case and discover, if we can, anything even tending to show that there was an *aggregatio mentium* of the parties to this suit for the purpose of consummating a transaction usurious under the law. It is true a large amount of correspondence passed between Dinkel and the directors, in which the taking of a bonus by the company was discussed; but in considering this correspondence, it must be borne in mind that the directors and Dinkel were both ignorant of the usury laws of New Mexico. The correspondence subsequent to the time

when the directors ascertained that there was a law on the subject of usury certainly establishes that the directors in Scotland were upright and honorable men, who desired to keep within the spirit as well as the letter of the law.

After being informed as to the usury law we find no intimation that they desired the company to profit by any bonus, but they expressly disavowed the act of Dinkel and Vincent, in even taking a bonus from themselves. As was well stated by Mr. Carson in his testimony, the directors could not know the local laws of New Mexico, and for that reason they retained Mr. Vincent, who at one time occupied the position of Chief Justice of New Mexico, as their local legal adviser, so that he might "*keep them right in legal matters.*" Mr. Dinkel had no authority to do any act for the company until it was first approved by the legal adviser. So then, during all this correspondence in reference to the McBroom loan, the directors knew that the transaction could not and would not be consummated until passed upon by their scrutinizing legal adviser, on whom they depended to "*keep them right in legal matters.*" In the light of this testimony, and the situation of the parties, the oft quoted telegram of September 23d, should, and as authority to Dinkel, did read:

"McBroom. The board sanction a loan of $30,000, first mortgage ten per cent., or $65,000 twelve per cent. Decline quarter interest; but, *if such a transaction will be legal under New Mexico law*, get best cash bonus possible instead, or get third party to buy quarter interest and pay us."

This was the first and only authority which Dinkel had to make a loan of $65,000 to McBroom. When Dinkel received it, all prior negotiations between him and McBroom had been broken off. He took this telegram to Vincent,

the legal adviser and a member of the advisory board, who thereupon said: "*You understand, Mr. Dinkel, that the company cannot take the bonus.*" Dinkel and Vincent then agreed that a bonus should be taken, *not for the company*, but for themselves.

Construing this telegram in the most favorable light for the plaintiff, it authorized the taking of a bonus *for the company*. Under no construction can it be said that the telegram conveyed any consent or authority for the taking of a bonus by Dinkel and Vincent *for themselves*; and there is no intimation in the record anywhere that the company ever even considered the taking of a bonus by Dinkel and Vincent for themselves.

Two days afterwards checks of the company amounting to $65,000 were made out to the order of McBroom, and delivered to him. One of the checks for $6,500, was endorsed by McBroom and delivered to Dinkel or Vincent. McBroom also gave to Dinkel two notes each for the sum of $1,000. The company, *the defendant*, and its managing officers, were 5,000 miles away, and did not and could not know that *such* a contract as was actually made, had been consummated, until several days after the $65,000 of the company's money had been paid out.

The letter of Sept. 25, 1886, written by the company to Dinkel (Rec. p. 82) and quoted from on page 8 of plaintiff in error's brief in this cause, if so quoted for the purpose of showing that the company was advised of the character of the transaction entered into, when the loan to McBroom was made, is misleading. The facts as shown by the record are that when the company wrote to Dinkel expressing "their very high appreciation" of Dinkel's efforts

in the McBroom loan, the company had no information as to the details of the remarkable transaction which Dinkel had entered into with McBroom except the cablegram of Sept. 24, 1886, from Dinkel to the company, which read: "McBroom arranged; send $15,000 to complete."

That the company reasonably supposed their trusted agent had made the loan as instructed, if at all, and hence thanked him for his efforts, is apparent, as Dinkel for some unexplained reason did not write in New Mexico the details of this transaction to his company in Scotland until Oct. 7, 1886, (Rec. p. 84), and allowing but ten days for the transit of the letter, it must have been nearly a month after the letter of thanks which the company wrote Dinkel before it knew that its instructions had been disobeyed and its agent and solicitor in America had completed a transaction by which they were to divide between them $6,500. Taken in the most unfavorable light for the company, no instructions for any such transaction as that had been given to Dinkel. At the most the company had directed Dinkel to loan $65,000 to McBroom at 12 per cent., to decline a one-fourth interest in the ranch but to accept *for the company* in lieu of the one-fourth interest offered, a cash bonus if he could get it. Instead Dinkel employed Judge Vincent to aid him in making the loan by which $6,500 of the $65,000 was diverted to the individual use of himself and Vincent. In fact Dinkel does not in his report of the loan pretend that he has done more for the company than to loan $65,000 of its money at 12 per cent. interest per annum. The $6,500 is to be divided as the private property of Vincent and himself. Vincent, when called upon by the company to pay his half over for the benefit of McBroom, flatly refused, vigorously insisting (Rec. p. 90) that it was his

money fairly earned by and paid to him in good faith, and Dinkle, though he offered to pay his half over to the company, did so only upon terms such as a man would make by way of trade and not by way of gift or surrender of his claimed rights. His special contract with the company above referred to for 1886 was for a salary of $5,000, and his offer was that if the company would bind itself to continue that annual payment of $5,000 *in cash* for three more years, he would give the company *his note unsecured for* $3,250, *payable three years from its date without interest.* We submit, then, that the taking of the bonus by Dinkel and Vincent was without the *authority, knowledge or consent* of the defendant company, and that neither law nor justice will hold the company guilty of usury.

In the case of Palmer vs. Call, decided in the U. S. Circuit Court for the district of Iowa, in 1881, 7 Fed. Rep. 737, one Davison placed $10,000 in the hands of one Burnham as her agent to be loaned. Burnham made the loan to Call, giving him $8,000, retaining $2,000 as commission, and receiving in his own name Call's note for $10,000, with semi-annual interest notes of $500 each. Burnham retained custody of the notes, but recognized them as the property of Davison. The commission was retained by Burnham without the knowledge, authority or consent of Davison. Subsequently the notes were transferred to plaintiff Palmer, who brought suit to collect his money. The plea of usury was interposed.

McCrary, Circuit Judge, deciding against the plea of usury, says:

"Doubtless, in general, the intent of an agent acting within the scope of his authority may be imputed to the principal. But it is settled beyond question that if any

agent in good faith makes a loan for another, and without the knowledge or authority of his principal, and for the agent's own benefit exacts more than legal interest, the loan is not thereby rendered usurious. In such case the law does not impute the knowledge and the intent of the agent to the principal. This doctrine is supported by numerous authorities both in England and this country. Tyler on Usury, 156–172; *Dagnel vs. Wigley*, 11 East, 43; *Solartee vs. Melville*, 7 Barn. & Cress. 427; *Coster vs. Dilworth*, 8 Cow. 299; *Condit vs. Baldwin*, 21 N. Y. 219; *Smith vs. Marvin*, 27 N. Y. 137; *Bell vs. Day*, 32 N. Y. 165; *Baxter vs. Buck*, 10 Vt. 548; *Muir vs. Newark Ins. Co.*, 16 N. J. Eq. 537; *Canover vs. Van Mater*, 18 N. J. Eq. 486; *Rogers vs. Buckingham*, 33 Conn. 81; *Hopkins vs. Baker*, 2 P. H. (Va.) 110; *Gokey vs. Knapp*, 44 Iowa 32; *Myllis vs. Ault*, 45 Iowa 46; *the result summed up in Alb. Law Journal*, 116; *Barrett vs. Snoden*, 5 Wend. 181.

"I have the greatest confidence in the correctness and stability of this rule, from the fact that it rests upon solid foundations of reason and justice. The lender employs an agent to loan his money. He gives the agent no authority to violate the law. He has no knowledge of the fact that usurious interest is extorted. He has no intent to receive, and does not receive, more than the law allows. He derives no benefit from the illegal transaction. But the agent and borrower, without the knowledge, consent or authority of the lender, enters into an illegal contract for the payment of excessive interest. The borrower and agent are guilty parties. They knowingly violate the law. They are *particeps criminis*, though it may be in unequal degrees. They knowingly put the lender's money in jeopardy without the least pecuniary advantage to him. It is the lender who is prejudiced and injured by such a transaction. Would it not be most unjust to inflict the pecuniary loss upon the lender, who is without fault and free from any illegal intention, in favor of a party who has knowingly and willfully participated in the violation of the law? Would it be consistent with sound morality so to do? What right has the borrower to assume or to believe that the lender's agent is authorized by his principal to violate the law by the taking of usurious interest? The lender's agent is either a special or a general agent. If he is specially employed to negotiate the particular loan and no other, it is the legal duty of the borrower to look to the

special authority, and the principal is not bound beyond the special authority. If he is a general loan agent, the limitation is that he must keep within the usual and ordinary scope of the business committed to him. The borrower must determine the extent of the authority by considering what is the usual and ordinary course of that business. Is it within the usual and ordinary course for an agent to take excessive interest in violation of the law? Such a practice is *extraordinary*. It is *without* the usual course of business. The natural and proper inference for the borrower to draw from the fact of the agent's proposing to take illegal interest would be that in so doing he would be acting without the authority of his principal. It may be said that the principal is responsible for the frauds of his agent in the course of the business committed to him, even though the principal should be ignorant of the fraudulent acts or should expressly prohibit them. Very true; but in this case there are two innocent parties—the principal and the party defrauded. * * * But in the case of usury contracted for through an agent the borrower is not innocent. He participates knowingly in the violation of the law. He has no merit to plead in his defense; while the lender, in the absence of authority given by him, or knowledge of the violation of the law, is wholly innocent and entirely free from moral guilt. Indeed, it smacks strongly of fraud in the borrower to enter into a contract with the lender's agent to pay usurious interest, without any inquiry whatever into the authority of the agent to make an unlawful contract, which the borrower knows cannot be enforced; for in this way the borrower, in connivance with the agent, gets the lender's money with the intent, demonstrated by his subsequent plea of usury to avoid the fulfillment of his contract."

The above mentioned case was taken to this Court and is reported as *Call vs. Palmer*, 116 U. S., 98. This Court in affirming the judgment of the lower court says:

"It is clear, therefore, that Mrs. Davidson cannot be charged with taking or reserving usurious interest, unless she was bound by the acts of her agent, Burnham. But she was not so bound. It is settled that when an agent who is authorized by his principal to lend money for lawful interest exacts for his own benefit more than the lawful rate, without authority or knowledge of his principal, the loan is

not thereby rendered usurious. *Dagnall vs. Wigley*, 11 East., 43; *Solarte vs. Melville*, 7 Barn. & C., 430; *Barretto vs. Snowden*, 5 Wend., 181; *Condit vs. Baldwin*, 21 N. Y., 219; *Bell vs. Day*, 32 N. Y., 165; *Conover vs. Van Meter*, 18 N. J. Eq., 486; *Rogers vs. Buckingham*, 33 Conn., 81; *Gokey vs. Knapp*, 44 Iowa, 32; *Wyllis vs. Ault*, 46 Iowa, 46; *Brigham vs. Myers*, 51 Iowa, 397; *S. C.*, 1 N. W. Rep., 613."

In the case of *Call vs. Palmer*, *supra*, Burnham did not disclose his agency, but represented that he was the principal; and counsel for Call deemed that fact of great importance. So in the case at bar, counsel for plaintiff in error seems to consider the testimony of McBroom to the effect that Dinkel said the bonus was to go to the company, a matter of great legal significance; that McBroom thereby acquired some substantial right of property. But this Court in discussing that subject, says:

"The fact on which stress is laid by counsel for defendant, that Burnham, in his treaty with Call, did not disclose his agency, but professed to be acting for himself, appears to be an immaterial circumstance. The misrepresentation of Burnham did not injuriously affect any right of Call, unless it can be said that he was entitled to know who the real lender was, so as to place himself in a position to plead usury against her. It can hardly be contended that the penalties imposed for a violation of the usury laws are intended as a reward to the borrower."

This last proposition is in accord with numerous decisions of the State courts. In the case of *Esteves et al. vs. Purdy et al.*, 66 N. Y. 449, the court of appeals of New York, states the proposition thus:

"A commission, in excess of lawfull interest, exacted by an agent for his own benefit, without the knowledge of his principal, does not necessarily make the loan usurious, even though the borrower believes the agent was dealing with him as principal."

The trial Court proceeded upon a theory in every re-

spect at variance with these cases, and held that Dinkel was the embodiment of the company, its *alter ego*, and *unless he told* McBroom that the $6,500 was not for the company, the company would be liable for double that amount. The Court (Rec. p. 128) at the request of plaintiff instructed the jury as follows:

"Applying these principles of law to this case, you are instructed that if George J. Dinkel was general manager in New Mexico for the Scottish Mortgage and Land Investment Company of New Mexico (Limited), and as such was entrusted with the general management, conduct and control of said company's business of loaning money in New Mexico, and in such capacity of manager, made the loan of $65,000 to the plaintiff, McBroom, for and on behalf of said company, and in addition to receiving from McBroom interest notes for the payment of interest on said loan at the rate of twelve per cent. per annum, charged and received from the said McBroom the sum of $6,500 in cash, as a commission or discount for the making of said loan, *and in so doing, assumed to the said McBroom to be acting for the benefit of said company, and not for himself personally, and McBroom had no knowledge or information of any want of authority in the said Dinkel, to charge and receive such commission for and on behalf of said company, then if you find these facts established by the evidence, the transaction was usurious, and McBroom entitled under the law to recover back from said company double this amount of $6,500, so paid in excess of twelve per cent. interest, which would be $13,000.*"

The giving of this instruction we believe to be most flagrant error. It took away from the jury all question as to the actual authority of Dinkel, notwithstanding the uncontradicted testimony shows that Dinkel was only a special agent of the company whose authority was exceedingly limited and *that this was made known to McBroom.*

Counsel for plaintiff in error, in contending that the transaction in question was usurious, cites only three cases in support of such contention. These are the cases of *Fowler vs. Trust Company*, 141 U. S. 384; *Sherwood vs.*

Rountree, 32 Federal Rep. 113; *New England Manufacturing Co. vs Guy*, 32 Fed. Rep. 636.

These cases, we insist, are readily distinguishable from the case *at bar*. In those cases the lenders employed agents to loan money at the highest legal rate of interest, and it was stipulated and understood that the agents should receive all the compensation for their services from the borrower. It also appears that these agents had made a large number of loans and performed a large amount of work for the lenders without compensation, except that which they received from the borrower; and the court held that in such case the lender was presumed to know that the agent was getting pay for his services from the borrower, and that it was not the policy of the law to permit the lender to receive such valuable services, the compensation for which was paid by the borrower.

In those cases the lender *actually received* the usury, not in money, it is true, but in services of the agent.

In the case at bar, Dinkel was receiving a salary of five thousand dollars a year for his services, and was not expected or authorized to receive any bonus or thing of value from the borrower.

From all the authorities, it is clear that the court will look at the real transaction as consummated, and from that determine whether the *parties to the suit* are guilty of usury. It makes no difference whether *Dinkel and Vincent* individually have committed usury. It is sufficient to know that the taking of the bonus by *Dinkel and Vincent* was done without authority or knowledge of the defendant.

In considering the testimony as to the authority of Dinkel it will not be presumed that he was authorized to do an illegal act.

"Every authority given to an agent to transact business for his principal must, in the absence of counterproofs, be construed to be to transact it in accordance with the laws of the place where it is to be done."

Owings vs. Hull, 9 Pet. 527.

If Messrs. Dinkel and Vincent are to be construed with reference to this transaction as *officers* of the defendant company, then McBroom instead of bringing his suit against the company should have brought his suit against Dinkel and Vincent. It seems to us that the statutes of New Mexico clearly provide for such a contingency.

Section 1738 of the Compiled Laws is as follows:

"The provisions of this act shall apply to any person, persons, corporation or *officer* of the same, who may charge, receive or collect," etc., "by means of discount, commission, *agency* or any other subterfuge."

The legislature undoubtedly intended that the party who *actually received* usury should be the one to pay the penalty. This contention is in harmony with recent cases on that subject.

This Court in the case of *Grant vs. Phoenix Life Ins. Co*, 121 U. S., 117, says:

"But we are of the opinion that the evidence shows that the commissions paid by Grant upon the loans (in which the usury is alleged to have consisted), were not paid to the plaintiff. The *plaintiff* made no contract for usurious interest, nor did it take any."

That was a case of a corporation acting through its agent the same as in the case at bar.

The same principle was involved in the case of *Chicago Fire Proofing Co. et al. vs. Park Nat. Bank*, decided Nov. 23, 1892, and reported in 32 N. E. R., 534. The syllabus of the case, which is borne out by the decision, is as follows:

"The president of a bank compelled a borrower from

the bank to pay him a commission in addition to the interest paid to the bank, and also to buy from him some worthless stocks, as a condition to obtaining the loan; but it did not appear that the bank received the commission or was benefitted by the sale of the stock. *Held*, that these transactions did not render the loan usurious."

Counsel for plaintiff in error in his statement dwells at length upon the testimony which shows that the company never refunded to McBroom the amount of bonus taken by Dinkel and Vincent, and that defendant subsequently took a chattel mortgage to secure the interest notes.

We fail to see how such facts can in any way make the company liable. The company endeavored in every way possible to have Dinkel and Vincent refund to McBroom the money which they had taken, but after an absolute refusal on the part of Dinkel and Vincent to refund, no reasonable person could expect the company *ex gratia* to pay McBroom the $6,500; nor can the fact that the company, after it knew that Dinkle and Vincent had received a bonus, undertook to enforce its securities render the company subject to any penalty. This was expressly decided in the case of *Estevez et al. vs. Purdy et al., supra.* The court in that case says:

"They parted with their money and took security for the precise amount loaned, with lawful interest, without any knowledge of the bonus, and their security comes to them untainted by usury according to the cases above cited. Hence they had the right to enforce them, and their attempt to do so, certainly, could not render them void *because of their subsequent knowledge of the bonus exacted.*"

We sincerely believe that when the court examines the record in this case in the light of all the authorities which we have cited, that it will conclude that the defendant company is not laible to any penalty for the taking of the $6,500 by Dinkle and Vincent. We believe we might

safely rest the case here, but, as counsel for plaintiff has discussed various propositions of law, which we believe are not applicable to the case at bar, we have no hesitancy in answering his arguments, and will discuss them in the order in which they are presented.

I.

The cause of action did not accrue upon payment of $6,500 to Dinkel and Vincent, nor upon the first payment of interest for a fixed period.

It will hardly do to put this question so vaguely as it is stated by plaintiff in error (p. 19 of his brief), for even in his view of the law it must be determined with certainty whether the cause of action accrued as to the $6,500, or the interest, or both, before any measure of penalty can be fixed. If this cause of action has accrued as to the interest and not as to the $6,500, then it follows that the recovery could not have been for $13,000, and the cause was properly reversed for that reason.

It will be observed that our statute prescribes two penalties for usury. Sections 1737 and 1738 of the Compiled Laws of New Mexico of 1884, are as follows:

"Section 1737. Any person, persons, or corporation, who shall hereafter charge, collect or receive from any person a higher rate of interest than 12 per cent. per annum, shall be guilty of a misdemeanor, and upon conviction thereof before the District Court or a justice of the peace, shall be fined in a sum of not less than twenty-five dollars nor more than one hundred dollars; and such person, persons, or corporation, shall forfeit to the person of whom such interest was collected or received, or to his executors, administrators or assigns, double the amount so collected

or received upon any action brought for the recovery of the same within three years after such cause of action accrued."

"Section 1738. The provisions of this act shall also apply to any person, persons, corporation, or officer of the same, who may charge, receive or collect a higher rate of interest than twelve per cent. per annum by means of discount, commission, agency, or any other subterfuge."

This suit was not brought to declare a contract usurious or punish the defendant with a fine, but to collect the penalty provided for in the second provision of section 1737.

In this case therefore the right of action accrued to plaintiff below under our statute, if at all, not because of the *charging* of illegal interest, but for *collecting* and *receiving* illegal interest, the penalties of the act for *charging* illegal interest being provided for by fine only. The right to recover back under the act double the "*amount so collected or received*," and not double the amount so *charged*, is clear. When, therefore, has there been such a collection and receiving of money as to warrant an action under our statute?

The statute provides a penalty which may be recovered; but a penalty for what and how much? Even if more than 12 per cent. had been charged no forfeiture is created. It is the collecting or receiving interest in excess of 12 per cent. for which a right of recovery is provided, and the measure of the recovery is double the excess either collected or received. Until the debt, 12 per cent. interest, and some excess has been collected, or received, there is no forfeiture.

If the plaintiff has only paid what he borrowed and legal interest and no more, at the date of the commencement of his action, then the party receiving such sum has

not collected more than was legally his due, and to hold otherwise would be to contend that a party may borrow $65,000, pay at the date of the borrowing $10,000, and thereupon proceed to recover from the party to whom he then honestly owes $55,000, the sum of $20,000 more as a penalty. Such in fact is the contention of the plaintiff in this case. He admits that he, at the date of the commencement of this suit, owed the defendant below $58,500, borrowed money, and legal interest thereon at 12 per cent. per annum for nearly three years, and, without paying or offering to pay a dollar of that indebtedness, he, by this suit, seeks to compel defendant below and defendant in error, to pay him the sum of $13,000 more as a penalty under the statute. (Rec. p. 40.) The glaring injustice of such a construction of a penal statute must be apparent. A review of all the recent authorities conclusively establishes that the contrary and more enlightened doctrine has been declared by the American courts.

In Massachusetts, under a statute similar in principle to our own, where, as stated by the court, "unlawful interest" having been paid, "the person paying it may within two years from the time of payment have an action of contract or bill in equity to recover back threefold the unlawful interest as paid," the Supreme Court of that State says:

> "No recovery for the forfeiture can be had unless there has been an actual payment of unlawful interest within two years. There is a *locus penitentiae* to the usurious lender, and if he receives no more than the sum lent, with lawful interest, he does not incur the penalty."
>
> *Simpson vs. Warren*, 15 Mass. 460.

> "The plaintiff in this suit cannot therefore recover as a penalty any sum whatever, because the amount which has been paid or tendered upon the usurious contract does not

equal the amount which he actually received, with lawful interest."

Smith vs. Robinson, 92 Mass. 132.

The Supreme Court of Missouri, in an action which is analogous in all particulars to the case at bar, says:

"It appears in evidence, on this record, that Welch had confessed two judgments to Hawkins, before a justice of the peace, of $150 each, at ten per cent; that the plaintiff and defendant walked out, and on their return, Hawkins told the witness that he had bought a mare and colt of the defendant, at $120, and that the mare and colt paid up the interest on said judgments and $30 upon the principal. The witness said the mare and colt paid the usurious interest above ten per cent. and $30 of the principal, and that the mare and colt were worth about $75. Here, if we estimate the mare and colt at $75, as did the witness, it will appear that the plaintiff still owes the defendant $225, after deducting that sum from $300, the amount of the judgment confessed before the justice of the peace. But if the mare and colt are to be estimated at the sum of $120, still the plaintiff will owe the defendant $180, and if the plaintiff now obtain a judgment against the defendant for $90 and collect that money from the said defendant, the plaintiff may, himself, become insolvent, and be unable to collect the principal, or rather that which remains of the principal, after deducting the price of the mare. The Circuit Court, then, committed error in instructing the jury that so much of the price of this mare and colt as was applied to the payment of usurious interest could be recovered in this action, although it appeared in evidence that the principal was yet unpaid."

Hawkins vs. Welch, 8 Mo. 492.

So in the case at bar, if the plaintiff now obtain a judgment against the defendant for $13,000 and collect that money from the defendant, the plaintiff may himself become insolvent and be unable to pay the principal, with legal interest, or that which would remain to the principal and legal interest, after the $6,500 should be deducted.

So, too, under Sec. 2067a, Georgia code, which de-

clares it "unlawful" to reserve, charge or take more than 8–100 interest directly or indirectly, and the following section, which declares a forfeiture of the excess of interest so charged or taken, the general principle here contended for has been recognized. In a recent case in that state, decided in November, 1887, for the recovery of such excessive interest paid in violation of that code, the principal contended for was admitted, but a controversy arose as to whether the legal debt, principal and interest, had been paid in full, the one side urging that a note of a third party accepted in part payment was the equivalent of cash, and the other side denying that proposition and insisting that no cause of action accrued, because full payment had not been made in cash or its equivalent. The Court held, in harmony with the courts of New Jersey, in *Nat'l Bank vs. Carpenter*, decided in 1890, by the Court of Errors and Appeals of New Jersey, 19 At. Rep., 182, that the acceptance of the *obligation of a third party* was such payment, and therefore that the cause of action had accrued to plaintiff, the language of the Court being as follows:

"The note (of the third party) was accepted in part payment, the rest of the debt (out of which the usury grew), having been paid in cash; so that at the time the action was brought, if the note (of the third party) was to be counted as any part of the payment, the lender had been paid all the principal, interest and usury. * * * And we think there was a cause of action under this statute, and that the note of a third person, if equivalent to cash, might be counted as cash * * * We agree with the Court that the cause of action accrued when that note was accepted, inasmuch as it turned out that it was the equivalent of cash."

Jackson vs. Garner 7 S. E. Rep., 214. (79 Ga. 415.)

In the case of *Kendall vs. Crouch*, 88 Ky. 199 (11 S.

W. R. 588), a case was presented to the Court of Appeals of Kentucky, where a sum of money had been paid as usury, *eo nomine*, and certain portions of the debt had also been paid and the remainder of the debt put into a new note. The statute of limitations was one year, and the suit was brought upon the last note, but more than a year after the usury, *eo nomine*, had been paid; and the question was whether the defense of usury was barred by the statute of limitations. The court in deciding that it was not so barred used the following language:

"Any payments theretofore made will be treated as having been paid upon the principal and legal interest, without regard to how they were in fact made or received. They will be so treated at the election of the debtor, although they were paid as usury, and, so far as the usury has been carried into the new note it is without consideration, and cannot be recovered."

Under the Revised Statutes of the United States, sec. 5,193, of the National Bank Act of the United States, there are numerous decisions to the same effect. The pertinent part of that section is as follows:

"SEC. 5,193. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

Bearing in mind that statutes prescribing penalties and punishments receive like construction, it is apparent that this United States Act contains provisions for the pun-

ishment of usury by way of the recovery, as a penalty, of double the usurious interest paid, very similar to the provisions of the New Mexico statute.

In the New Mexico statute the penalty is a dual one, for charging, collecting and receiving, a fine; and for collecting and receiving, a right of action on the part of the payor or his legal representatives to recover double the amount so paid. In the United States statute the penalty is also two fold, for taking, receiving or charging a forfeiture of all interest, but if the greater rate of interest has been paid, that is, if the money has been collected or received, the payor or his legal representatives may recover "twice the amount thus paid."

The Supreme Court of Massachusetts, in construing this United States statute, says:

"The same section provides further that if the greater rate of interest has been paid, the payor, etc., may recover back twice the amount of the interest thus paid from the bank taking or receiving the same. This remedy is applicable when the note has been paid, and, ordinarily, at least, not till then."

Petersborough Nat. Bank vs. Childs, 130 Mass. 520.

In *Duncan vs. First National Bank of Mount Pleasant*, in the United States District Court at Pittsburg, decided in 1876, the court in construing this United States statute, held:

"From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal, or up to the time of entering judgments, there is a *locus penitentiae* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal. * * * Up to that time he may make this election. When pay-

ment is actually made or judgment entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete. The original loans in these cases were more than two years before these actions were brought, but the payment of one of the Millinger notes was made and the judgment on the other Millinger note and the judgments on all the Duncan & Brother notes were entered, near the time of the bringing of these suits, less than two years before. The payment and the judgment concluded the transaction, and determined their character to be usurious. Till that time it was undetermined and the statute did not begin to run."

First Nat. Bank Cases, p 362.

Duncan vs. First Nat. Bank, (U. S. District Court, Pa.)

And in line with these decisions and pertinent to this contention of defendant in error, are the authorities to the effect that, unlike the application of payments, on commercial paper, not usurious, which are to be applied first in discharge of interest, the rule is that such payments, when made on an usurious loan, are to be applied in reduction of the principal. This rule is clearly stated in a recent case, decided by the Supreme Court of Nebraska, July 24, 1871, in the following language:

"If there is any usury in the transaction between the parties, it is in this note which the defendant yet holds. The plaintiff, however, insists that if the notes were not wholly paid by the drafts and cash payment, these payments should have been applied to extinguish usurious interest, and that double the amount thereof would be recoverable. The case of *Davis vs. Neligh*, 7 Neb. 78, is cited to sustain this position. That case holds that in computation of interest, when partial payments are made, the payment is applied first to discharge the interest and the surplus, if any, goes to reduce the principal. A different rule, however, obtains where a payment is made on a usurious loan. The law is not so inconsistent as to apply a payment on

such a loan to the discharge of usurious interest, and at the same time exact as a penalty the forfeiture of double the amount. This indeed would be a reproach upon the law."

Hall vs. First Nat Bank of Fairfield, 46 N. W. Rep. 151. (30 Neb. 99.)

In the Supreme Court of Vermont, under a State statute against usury, the same doctrine is applied in a decision of that court filed in May, 1888. There defendant loaned plaintiff $1,000, which defendant's agent counted out to plaintiff and then took from said sum $100, that being the usury agreed upon by the parties, in principle the contention of the plaintiff in error in the case at bar. The Vermont court in the case referred to held:

"As the result of that transaction the plaintiff went away with $900 in money, all he had ever received, as his own money, and the defendant with the plaintiff's note for $1,000. * * * Hence the $100 usury entered into and became a part of the mortgage note. The payments made by plaintiff and by one Mrs. Hardaker prior to the time of taking up the note would in law be applied towards the payment of the legal portion of the note. * * * All the payments made by her, as well as those made by plaintiff, up to the final payment, were in law to be applied towards the liquidation of the legal portion of the note. Hence the plaintiff is entitled to recover what was paid at the final payment of the note, above what was then legally due upon the note, after applying the payments made thereon, in liquidation of the legal portions of the note and interest."

Harvey vs. Nat. Life Ins. Co., 14 Atl. Rep. 8, 9. (60 Vt. 209.)

There are other authorities in harmony with the principle enunciated by the above authorities, but relating more especially to the question as to whether or not, *when an action has accrued* to recover illegal interest paid, the recovery should be for double the *whole* interest thus paid, or only double the *excess* over the legal rate.

Thus in South Carolina in a recent case arising under Sec. 2, 18 S. C. Stats., p 367, a statute of that state passed in 1882, which provides almost in the language of our statute, that any person "who shall receive as interest any greater amount than as herein provided for shall in addition to the forfeiture" (referring to Sec. 1, same act, making it unlawful to take more than seven per cent., without contract in writing), "herein provided for, forfeit also double the sum so received, to be collected in a separate action," the Supreme Court of that state held as follows:

"The only other question raised is as to the proper construction of the second section of the act of 1882 (18 St. 36), which reads as follows:

"'That any person or corporation who shall receive as interest any greater amount than is herein provided for, in addition to the forfeiture herein provided for, shall forfeit also double the sum so received, to be collected by a separate action, or allowed as a counter claim to any action brought to recover the principal sum.' The question is whether the amount which the borrower is authorized to recover from the lender under the provisions of this section is double the whole amount of the interest paid, or only double the amount of the excess thereof over the amount allowed by law. We think that it is the latter. In the absence of any written agreement providing for a greater rate, not exceeding ten per cent., the legal rate of interest as prescribed by the first section of the act above referred to is seven per cent. As there is no such written agreement in the contract now under consideration, the legal rate of interest on the note should only be seven per cent., and any interest charged for or received in excess of that amount, would be usurious. And when, in the second section, the act declared that any person, 'who shall receive as interest any greater amount than is herein provided for, (which as we have seen is seven per cent.), 'shall forfeit double the amount so received,' and it seems to us clear that the meaning is that if the lender on such a contract as this, receives an amount greater than seven per cent., he shall forfeit double the sum received in excess of seven per cent. The thing forbidden is to receive interest in excess

of seven per cent., and, when the act declares the forfeiture of double the amount so received, it must be double the amount of such excess, and not double the whole amount of interest received. The act does not make it unlawful to receive interest upon a contract up to seven per cent., but the illegality consists in receiving a greater amount than seven per cent., for that is the plain meaning of the language. 'Any greater amount than is herein provided for', and when it proceeds to fix the penalty for such illegal act by saying that he shall forfeit double the sum so received, the manifest meaning is double the sum illegally received. It will be observed that while in the first section of the act it is made unlawful to charge a greater rate of interest than seven per cent., unless by an express agreement in writing a greater rate, not exceeding ten per cent., is provided for, under the penalty of forfeiting all interest and costs, the first section of the act deals only with the receipt of a greater rate of interest than is provided for by the act, and provides in addition to the forfeiture mentioned in the first section, an additional forfeiture of double the sum illegally received. We do not find anything in the second section of the act which imposes any penalty upon the lender for receiving interest at the rate of seven per cent. upon such a contract as this is, but the penalty is for receiving a greater amount than such a rate would yield, and the penalty is double the amount in excess of that which he might receive without incurring the penalty imposed by the second section of the act. For example, if the lender here had only received interest at the rate of seven per cent. we do not see how this action could have been maintained, for no penalty is imposed for such an act, even though, under the circumstances attending this transaction, the lender would not have been allowed, under the provisions of the first section of this act, any interest at all, in an action on the note."

Harpin vs. Brinner, 9 S. E. Rep., 343-4. (30 S. C., 391.)

To the same effect are the following, among other authorities:

2 Waite's A. & D., 603, and authorities cited.

Huitermiester vs. First Nat'l Bk., 64 N. Y., 212.

Johnson vs. Bank, 74 N. Y., 329.

Dickinson vs. Thomas, 7 S. Rep., 506. (67 Miss. 777.)

The result of the foregoing is that before any forfeiture can be recovered under such a statute as ours, that the principal debt and legal interest must have been paid, and something more: that until the principal debt and legal interest have been paid, there is a *locus penitentiae* for the lender, and that the law will apply all payments made by the borrower, whether made as a bonus or premium, *eo nomine*, or whether made generally, as a payment upon the debt, and we believe that these cases are decisive of the case at bar, if the defendant in error, in any aspect of the case, is to be held responsible for the taking of the $6,500 by Dinkel and Vincent.

But there are a few other authorities to which counsel for plaintiff in error has referred, with apparent belief that they have some bearing upon the present case.

Some of these Pennsylvania cases are quoted in the brief of plaintiff in error as follows:

"In 1851, in *Oyster vs. Longnecker*, 16 Pa. St. 273, Gibson Ch. J., again delivered the opinion of the court as follows:

" 'It is settled that usury is not committed by payment of a premium less in amount than the legal interest. The offense consists by the statute, in taking more than six per cent. on a loan, and till more has been taken, the penalty is not incurred. *Lamb vs. Lindsey*, 4 Watts & Serg. 449, *Fisher vs. Beasley*, Doug. 235, *Wade vs. Wilson*, 1 East 195, and *Scurry vs. Freeman*, 2 Bos. & Bal. 381, are sufficient for the principle. The only cases that might seem to collide with them are *Musgrove vs. Gibbs*, 1 Dal. 216, and *Kirkpatrick vs. Houston*, 4 W. & S., 115, which ruled that any taking of interest, however small, on a usurious contract, is a completion of the offense. A distinction between interest and a bonus may seem to be a flimsy one, but it is

not. A return of part of the sum on which interest is received, reduces the contract essentially to a loan of the residue. The formal delivery of the whole with one hand, and the retrenchment of part of it with the other, like the formal delivery of a chattel returned at the execution of a bill of sale of it, is, in either case, simply a transparent artifice to elude the statute. The money returned, unlike the silk gown sometimes exacted by a wife for joining in a conveyance, is not a premium, but a *discount*; and the detention of a part of a bank loan as payment of interest in advance is legalized only by inveterate custom. If there was such a detention in this case, the contract for the nominal sum was usurious, but the offense was not committed *till something had been received on it.* In this view of the subject it would seem to be indifferent whether the sum detained were greater than the amount of the interest or not; payment of interest on the usurious sum would still be necessary. But the point is immaterial, as the whole interest was taken within the period of limitation; for it was ruled in *Lamb vs. Lindsey* and *Scurry vs. Freeman*, the latter of which is precisely like the case we have to deal with, that *every fresh taking is a fresh consummation of the same offense.*'

"The later cases in Pennsylvania, decided under the national banking act, though recognizing the doctrine of *locus penitentiæ*, adhere in substance to the qualifications of that doctrine laid down by Chief Justice Gibson:

"In *Brown vs. Bank*, 71 Pa. St. 209, the court said:

" 'There may be good reason for this if it was the intention of Congress to give a *locus penitentiæ* so far as the penalty of double the amount was concerned, and allow them to save it by not actually taking it upon the maturity and payment of the debt. This accords with the general current of the decisions upon the construction of the usury laws, *whenever the contract is not itself declared to be void by the statutes.* It is *actual payment* on the foot of the usurious contract, *either in part or in whole*, which consummates the usury, and from which the limitation of the action for the penalty, commences to run; but lawful interest may be recovered in action for the principal.'

"And in *Kearney vs. Bank*, 82 Pa. St. 490, (1889.) the same court said:

" 'The ruling complained of in the first satisfaction of error was justified by the case of *Brown vs. Bank*, 72 Pa.

St., 209, where it was held that '*it is actual payment on the foot of the usurious contract, either in part or in whole, which consummates the usury, and from which the limitation of the action for* the penalty commences to run.' If this were not so, and the usury is complete by merely including it in a renewal note, the penalty might be recovered without the payment of either principal or interest.'"

Counsel for plaintiff in error in commenting upon these cases says:

"The result of the Pennsylvania cases, therefore, is that under a statute which imposes a forfeiture for the *taking* alone of usury, a reservation by way of discount at the time the loan is made will not give a right of action until there has been a payment on the contract, in whole *or* in *part;* but that the first *definite payment of interest for a fixed period* determines the character of the transaction and consummates the usury, so that a right of action then accrues."

These Pennsylvania cases are the only modern American cases that we have been able to find, which hold that the *locus penitentiae* does not exist until the debt and legal interest has been paid. The English cases cited by plaintiff in error were all decided upon a statute which declared that all bonds, assurances, contracts, etc., for the payment of money upon usury over 5 per cent. should be void; and we do not see how the doctrine of *locus penitentiae* could have been invoked in those cases; nor how they can be made applicable to the present case. Upon an examination of those authorities it will be found that in every case, either more interest had been paid for the *stipulated time of the loan*, or that a premium had been paid, and subsequently interest for the stipulated time had also been paid.

In the case at bar, $65,000 was borrowed for a period of six years, with interest at the rate of 12 per cent. per annum. The amount of bonus was $6,500 and the subsequent payment of interest, December 31, 1886, was only

$2,842.19. So it appears that not even legal interest *for the stipulated time* had ever been paid; and so those English cases where more than legal interest *for the stipulated time* had been paid do not deserve consideration.

In the case of *Lloyd vs. Williams*, cited by counsel for plaintiff in error as a leading case, more than legal interest *for the stipulated time* had been paid.

In *Fisher vs. Beasley*, Doug. 235, a premium was taken in the first instance for the forbearance of a loan for six months, reserving interest, and the court held that the usury was not complete until the half year's interest was received, because the premium alone did not exceed the legal rate for the *stipulated time*.

In *Wade vs. Wilson*, 1 East. 195, the loan was of £600 for a year, and at the time it was made the lender took ten guineas as a premium with the borrower's note for the £600 with legal interest. At the end of a half year he collected the legal interest for that period. Suit for the penalty was brought immediately afterwards. It was objected principally that the loan being for a year and the premium paid for that time, the usury was not complete till the end of the year, when the whole interest was received in addition to the premium. In deciding the case Lord Kenyon, C. J., said:

"The case of *Fisher q. t. v. Beasley* does not apply; for there the only question was, whether the usury was complete before the party had received any interest at all, the amount of the premium being within the legal rate of interest. But here the party having ten guineas premium in hand, and interest accruing from day to day, actually received interest *qua* interest for half a year, which made what he received upon the whole amount to more than lawful interest for that time upon the sum lent. It is im-

possible upon this statement not to say that the usury was complete when the half year's interest was received."

Lawrence, J., said:

"The argument is, that the contract being for forbearance of principal for a year, and interest being reserved yearly, therefore there could be no usury committed till the end of the year; and it is supposed that the case of *Fisher vs. Beasley* is an authority for that position. But that is not the case here; for the contract is stated to be *at the rate* of five per cent.; it is not stated that the defendant was to wait for his interest till the end of the year; but it was to accrue, as by law it does, *de die in diem*. Therefore after the receipt of the premium, as soon us any interest as such was paid on the loan, though but for a day, it would constitute usury. The parties themselves did not consider that the interest was not due till the end of the year, for it was actually paid by the one and received by the other at the end of the first half year without objection. Here then is a premium paid of ten guineas at first which was to run through the whole year; and interest accruing daily on the principal sum, the defendant actually received interest for the first half year, which together with what he had before received by way of premium amounts to more than legal interest."

In the case of *Scurry vs. Freeman*, 2 Bos. & Pul., 381, a loan of £500 having been made, and a premium of £50 received on it, the lender afterwards collected five per cent. interest on the £500 was usurious, because the loan should be treated as actually for only £450.

The result of these English cases then is, that unless the bonus exceeds the whole interest *for the stipulated time of the loan*, no penalty can be recovered; that the amount of the bonus should be considered as a reduction of the sum borrowed to the extent thereof, and that when any subsequent sum of money is paid as interest for any specified period of time, that the transaction is then usurious.

Assuming for the sake of argument that these cases

are to be considered as the law of the case at bar, let us see what the result would be.

Deducting the $6,500 from the loan of $65,000 leaves the sum borrowed at $58,500. On December 31st, 1886, the sum of $2,842.10 is paid as interest from August 20, 1886 to December 31, 1886, a period of 132 days. Legal interest on the sum of $58,500 for that period of time would be $2,574. This would leave a payment of $268.19 in excess of the legal rate of interest, and according to those cases, upon that theory, the plaintiff would be entitled to recover in this suit only the sum of twice the excess, which is $536.38.

If we proceed upon the theory of the case of *Wade vs. Wilson*, 1 East., 195, where it is stated:

"Here then is a premium paid of ten guineas at first, which was to run through the whole year," (*which was the stipulated time of the loan,*)

We have the following result:

The entire period of the loan was six years. Distribute the $6,500 premium paid over that period of six years, and the amount of the $6,500 which would apply on the loan for the period of 132 days; the period for which interest was subsequently paid, would be the sum of $360. So upon this theory, the excess of interest paid for the 132 days was $396, and the plaintiff is entitled to recover in this suit only twice that sum, or $792.

To escape the application of the doctrine announced in *Harvey vs. Nat. Life Ins. Co.*, 60 Vt., 209, the English case of *Scurry vs. Freeman*, 2 Bos. & P., 381 and others *supra*, plaintiff in error resorts in his brief to a novel construction of the word discount as used in the New Mexico statute. Discount is only one of the "other subterfuges"

guarded against by the section and is nothing more. Under the circumstances in this case, there was neither a receipt of interest by the discount of McBroom's notes nor in any other way, but under the authorities cited, a loan of $58,500.

If then, the payment of the interest December 31, 1886, was at all material, the recovery could only have been as indicated above, and the judgment for $13,000 is excessive and should be reversed.

But plaintiff in error, through his counsel, disclaimed any right to a recovery upon any such theory. On the trial of the case, counsel for plaintiff in error stated:

"I will state to the Court, I will withdraw the claim for that interest between the 20th of August and the 25th of September; I also make no claim of interest on the penalty, *but stand simply on the claim for twice the* $6500 *bonus.*" (Rec. p. 106.)

This, as clearly as language could put it, was a plain voluntary withdrawal from the case by the plaintiff in error of all the claims or demands set out in his declaration except the single item and claim "for twice the $6,500 bonus." The question of interest or claims on account of usury arising out of payments of interest outside of the $6,500, are not now before the court as a part of this case, and the authorities cited by plaintiff in error as to the payments of such interest and the effect of such payments do not apply to the facts in this case as it is now presented.

II.

The *locus penitentiae* had not expired at the time of the commencement of the suit by reason of any act of the defendant company.

The *locus penitentiae* is not limited in time, or by acts as claimed in plaintiff in error's brief. The law gives the lender until payment of, or judgment rendered for, his debt. Until then he may give credit. This is certainly the logical result of the cases in Massachusetts, Missouri, Georgia, Kentucky, Nebraska, and the Federal Courts of the United States which we have heretofore cited, where it is held that no cause of action accrued to recover the forfeiture, under such a statute as ours, until the debt, legal interest, and *something more* had been paid.

As was stated in *Duncan vs. First National Bank*, U. S. District Court of Pennsylvania, First National Bank Cases, page 362:

"From the origin of the loan, from the retaining of the first discount, through all the renewals up to the time of final payment of the principal, or up to the time of entering judgment, there is a *locus penitentiae* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal. Up to that time he may make this election."

The only case cited by counsel for plaintiff in error where the doctrine of *locus penitentiae* was invoked, which intimates that the day of repentance passed before the final payment of the debt and legal interest, was the Pennsylvania case, quoted on pages 28 and 29 of his brief. But upon examination of this case it will appear that judgment

had been rendered for the debt, and also the usurious interest, and it was not until after execution had been sued out for the whole of the judgment, including the usury, that the lender offered to remit usurious interest. This case is clearly distinguishable from the case at bar, assuming the liability of the company as claimed by plaintiff in error If judgment should be obtained for the whole debt, including the usury, the legal portion of the debt and the usury are merged in the judgment and cannot be separated. In such a case the whole judgment is tainted with usury, and has no part which can be carried into execution without at the same time aiding the lender in recovering his usury. In such a case we are willing to admit that the *locus penitentiae* is gone. But even in that case, Chief Justice Gibson said:

"I will not say that the defendant might not lawfully receive *pro tanto* payment specially in discharge of what was lawfully due, for it is the corruption of taking, and not the corruption of the contract which constitutes the offense to which the penalty is annexed."

The extending of the *locus penitentiae* until the final payment of the debt and legal interest does not defeat the law, but carries it into effect, giving the party a right to recover back double the usury he has paid, *after he has paid it*, but not while he is a debtor and has only agreed to pay it.

III.

The notes given by the plaintiff to the defendant are not void, even if the loan was usurious.

As to the contract in this case being absolutely void as contended for by plaintiff in error, we do not clearly see how that question can arise in this case, as this is a suit to recover a penalty, and not to declare a usurious contract void.

Even if the contract is void we do not see upon what theory plaintiff expects to recover the sum claimed. The plaintiff has not even paid to the defendant interest on the sum borrowed at the rate of 12 per cent. for the stipulated time of the loan. The Legislature certainly never intended that a borrower could recover *until he had paid more than legal interest.* To construe the statute otherwise would be to hold that McBroom could borrow $65,000 from defendant, pay a bonus of $6,500, the next day recover a penalty of $13,000 and go away with $71,500 of defendant's money, no part of which could ever be recovered. If the notes are void, they cannot be enforced in the courts. Under such a construction of the statute it is no longer a misfortune for one in New Mexico to borrow money. Indeed, it is exceedingly profitable, if he can only induce the lender or his agent to accept a bonus. And this is just what plaintiff wants this court to aid him in doing. He wants this court to say that the taking of the bonus by Dinkel and Vincent was the act of the company; that the taking of such bonus rendered the contract usurious and void; that he cannot

be made to repay even the original sum borrowed; and that the *company must pay him a premium of* $13,000 *for his unselfish and laudable desire to see the majesty of the law prevail.*

To the contention of plaintiff in error as set out in his brief that the contract is void, we urge that he has correctly stated an old and well known rule of law without its numerous exceptions when applied to the facts, and that in applying this general rule to usury statutes, he has failed to distinguish between statutes in terms declaring such usurious contracts void, and statutes such as ours in which such contracts are not in terms so declared void, and in which the act itself not only provides another and different penalty or penalties for its violation, but, in effect, declares that such contracts are not void.

Counsel for plaintiff in error insists that inasmuch as the New Mexico statute makes the charging, collecting or receiving of more than 12 per cent. a misdemeanor, punishable by a fine, that this implies a prohibition, and that therefore contracts made in contravention of the statute are void. Granting for the purpose of the argument that the statute is prohibitory, still we insist that the notes given by the plaintiff are not void. The general rule of construction of prohibitory statutes with reference to contracts made in violation of them, is clearly stated in the following cases, some of which are cited by counsel for plaintiff in error:

In the case of *Pratt et al. vs. Short et al.*, 79 N. Y. 445, decided in 1880, it is said:

"So also a prohibitory statute may itself point out the consequences of its violation, and if, on a consideration of the whole statute, it appears that the Legislature in-

tended to define such consequences, and to exclude any other penalty or forfeiture than such as is declared in the statute itself, no other will be enforced, and if an action can be maintained on the transaction of which the prohibited transaction was a part, without sanctioning the illegality, such action will be entertained."

The Supreme Court of Iowa says:

"It must be apparent to every legal mind, that when a statute annexes a penalty for the doing of an act, it does not *always* imply such a prohibition as will render the act void. Suppose, for instance, the act itself expressly provided that the penalty annexed should not have the effect of rendering the act void. Surely in such case the courts would not give such force to the legal implication, under the general rule above quoted, as to override the express negation of it in the statute itself. Then, upon this conclusion, we are prepared for the next step, which is equally plain, that if it is manifest from the language of the statute, or from its subject matter and the plain intent of it, that the act was not to be made void, but only to punish the person doing it with the penalty prescribed, it is equally clear that the courts would readily construe the statute in accordance with its language and plain intent. We are, therefore, brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly."

Pangborn vs. Westlake, 36 Iowa, 548.

This court in the case of *Harris vs. Runnels*, 12 How. 79, in speaking of the application of the doctrine contended for by counsel for plaintiff in error, says:

"We have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be

examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the Legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice."

This court, in the case of *Miller vs. Ammon*, 145 U. S. 426, adopts the law as laid down in *Pangborn vs. Westlake* and *Harris vs. Runnels*, *supra*, and in the course of the decision says:

"Courts will always look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished by its enactment, and if from all these it is manifest that it is not intended to imply a prohibition or to render the prohibited act void, the courts will so hold and construe the statute accordingly."

Thereupon this court proceeded to apply that law to a contract for the sale of liquors, and said:

"Nor when we consider the subject matter of the legislation is there anything to justify a presumed intent on the part of the lawmakers to relieve the wrongdoer from the ordinary consequences of a forbidden act. By common consent the liquor traffic is freighted with peril to the general welfare, and the necessity of careful regulation is universally conceded. Compliance with these regulations by all engaging in the traffic is imperative; and it cannot be presumed, in the absence of express language, that the lawmakers intended that contracts forbidden by the regulations should be as valid as though there were no such regulations and that disobedience should be attended with no other consequence than the liability to the penalty."

In other words the court held that *in that case* of the regulation of the liquor traffic which, "by common consent" * * * "is freighted with peril to the general welfare," etc., it was the intention of the legislative power

to declare void contracts prohibited by that city ordinance of Chicago.

The result of these cases is, that before declaring such a contract void, courts will always examine the whole statute and the subject matter of it, for the purpose of finding out whether or not the makers of it intended that a contract in contravention of the statute should be void, or that it was not to be so.

Besides these cases, numerous authorities can be found to support the proposition that *forfeitures are not favored in the law. Courts always incline against them. When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred.*

Following these rules of construction, let us now examine the statutes of New Mexico upon the question of interest and usury *as a whole*, and ascertain whether it was intended by the legislature of New Mexico that contracts which are usurious should be absolutely void.

For the purpose of ascertaining this intent of the legislature let us refer to the history of legislation upon this subject in the Territory. The first statute upon this subject in the Territory of New Mexico was the act of January 2, 1852, which provided that any one charging over 12 per cent. should forfeit the whole interest and should only be entitled to recover the debt due without any rate of interest whatever. (Rev. Stats. N. M. of 1865, p. 594.)

In 1866, the legislature passed another act, which allowed interest upon written contracts for the payment of money up to 12 per cent. per annum, but declared emphatically that if more than 12 per cent. should be reserved, such contracts should be illegal, and the person so offending should be liable to indictment before the grand jury,

and on conviction thereof should suffer the penalty inflicted by law upon those who obtain money under false pretenses.

Session Laws, 1865–1866, page 116.

In 1872 an act was passed abolishing the offense of usury and providing that all contracts concerning the payment of money should be binding according to their intent and meaning.

In 1882 the act of 1872 was repealed and the following statute enacted:

"That in current or open accounts in commercial houses, there shall not be collected more than 6 per cent. interest thereon, six months after the delivery of the last article; provided, *that in written contracts for the payment of money, it shall not be legal to recover more than 12 per cent. interest per annum.*"

Laws of New Mexico 1882, page 43.

This last act also appears as section 1736 of the Compiled Laws of New Mexico 1884, and immediately precedes sections 1737 and 1738, quoted by counsel for plaintiff in error; and instead of two sections constituting the entire law of New Mexico, regulating the rate of interest, we have these *three;* and it is necessary that these three sections be construed together.

Sec. 1736 says:

"That in written contracts for the payment of money, it shall not be legal to recover more than 12 per cent. interest per annum."

Any casual reader of this section would not be in doubt as to the intention of the legislature, because if it shall not be legal to recover more than 12 per cent. interest per annum upon written contracts, then upon such contracts the principal and 12 per cent. interest *may be recovered*. So,

using the language of the Supreme Court of the Territory of New Mexico in construing this section, in *Milligan vs. Cromwell*, 3 N. M. (Johnson) 330:

"If it should not be legal to recover more than 12 per cent. interest per annum upon written contracts, the converse of that proposition would seem to follow as a necessary consequence; that it shall be lawful to recover on such contract 12 per cent. interest per annum."

And the courts of New Mexico have invariably held under this statute that where a contract was made which provided on its face for the payment of interest above the rate of 12 per cent. per annum, that such contracts were not void, but that the amount loaned with 12 per cent. interest could be recovered.

Reading then sections 1736 and 1737 together, we have in substance this provision:

"That upon written contracts for the payment of money it shall be legal to recover 12 per cent. interest per annum, but any person, persons, or corporation who shall hereafter charge, collect or receive from any person a higher rate of interest than 12 per cent. per annum shall be guilty of a misdemeanor and upon conviction thereof, etc., be fined in a sum of not less than $25 nor more than $100 and such person, persons or corporation shall forfeit to the person who has paid such interest above 12 per cent. double the *amount so paid*."

We are also told by the learned courts whom we have above quoted, that, before declaring contracts void under a prohibitory statute, they will look into the *subject matter* of the statute for the purpose of determining whether the Legislature intended that such effect should be given to the statute.

As was stated by the Supreme Court of New Mexico in this case, "Anciently at the common law, any premium taken for the use of money was an offense; such a prem-

ium was denominated usury, no such term as interest being known to the law. By the statute of 3 Henry VII and 11 Henry IV, all usury is damned and prohibited as being against the laws of God and the law of the realm and the law of nature. (3rd Inst., 152.) The Statute of 37 H. VIII, c. 9, although entitled an act against usury, was the first English statute that undertook to make usury in a limited degree lawful."

But in this more enlightened age, *usury is no longer considered an iniquity*

"The iniquity of a usurious loan has long since disappeared from our jurisprudence, except as to the excess above the authorized rate of interest. Even in courts of equity, everywhere—which are considered as the purest tribunals—when usury is established, the contract will be enforced for the sum loaned and the borrower compelled to pay it back. It would seem then that the measure of illegality or immorality is the extent of the prohibition, and that applies not to the *loan*, in which there is no moral vice, but only to the forbidden excess of interest."

Farmers' & Traders' Bank vs. Harrison et al., 57 Mo. 509.

"At an early period in the history of English jurisprudence, usury, or as it was then called, the loaning of money at interest, was deemed a very high offense. But since the days of Henry VIII the taking of interest has been sanctioned by statute. In this country some of the States have no law against taking any amount of interest, which may be fixed by the contract. The act of usury has long since lost that deep moral stain which was formerly attached to it."

Lloyd vs. Scott, 4th Peters, 224.

"Usury has now ceased to be a crime. It is unlawful to the extent that it is made so by statute, and no further."

7 How. (Miss.) 535.

Doubtless then for the reason that usury is no longer considered an iniquity, and the *subject matter* of statuest

concerning usury was not sufficient to authorize the courts in adding another penalty to that which the legislature had prescribed, no decision of any American court can be found where contracts were held to be void on account of usury, if the statute which prohibited the taking of more than a certain rate of interest, also provided a fixed penalty for the violation of the statute. But numerous authorities can be found which hold, that if a statute regulating the rate of interest provides a penalty for its violation, the penalty provided for by the statute is exclusive, and contracts made in contravention of the statute are not void—that the courts will not add another penalty to that which the Legislature has provided.

Among these numerous authorities are the following:

"In most of the states there are laws regulating the rate of interest; and yet we have been referred to no case and have found none in which a contract has been declared void by reason of the fact that a greater rate of interest than that allowed by law has been received under it, unless the law itself has provided that the taking of illegal interest shall render the contract void."

Lazaer vs. Nat. Bank, 52 Md. 78,121.

But though no cases declaring void such contracts for usury be produced, numerous cases holding such contracts valid under statutes similar to ours are available.

In a case decided in 1823 by the Supreme Court of the United States, in which an alleged usurious transaction on the part of the Bank of the United States was involved, Mr. Justice Story, delivering the opinion of the court, says, as to the voiding of the contract because of usury:

"The act has not pronounced that such a violation makes the contract *ipso facto* void, but has punished it by a specific penalty of treble the value."

Fleckner vs. Bk. U. S., 8 Wheaton, 353.

The same court in 1874, in construing the usury law of Utah, which, as stated in the head notes of the decision, made "usury penal, but not declaring the contract void," says of the securities in suit:

"For the amount upon the two original notes to Burnhisel and upon the one to Pond transferred to Burnhisel, the two latter notes with the rate of interest stipulated in them and the mortgage securing them, were, aside from the objection arising under the bankrupt law, unquestionably valid securities (authorities cited). In Pennsylvania, where there is a statute making usury penal, but not declaring the contract void, a usurious bond and mortgage may be enforced for the amount actually due."

Bernhisel vs. Firman, 22 Wal. 170.
768).

Section 5198, Revised Statutes of the United States, the section of the National Banking Act providing *a penalty* and forfeiture for usury, is, like ours, a penal statute.

Blain vs. Curtis, (Va.) 7 Atl. Rep. 708.
Barnet vs. Nat. Bank, 98 U. S. 555.
Bank vs. Dearing, 91 U. S. 29.

(And also see authorities cited in plaintiff in error's brief, page 41, to the effect that statutes prohibiting the doing of an act and statutes prescribing a penalty for the doing of an act, receive like construction.)

Construing this section, 5198, the same Court in 1875 says:

"Where a statute prescribes a rate of interest and simply forbids the taking of more, and more is contracted for, the contract is good for what might lawfully be taken and void only as to the excess (authorities cited). Forfeitures are not favored in the law. Courts always incline against them. (*Marshal vs. Vicksburg*, 15 Wall., 146.) When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred. Vattel's 29th rule of construction.

"When a statute creates a new offense and denounces the penalty or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes."

Bank vs. Dearing, 91 U. S., 29.

Again in 1878 the same Court in construing the same section declares the suit to recover double the amount of the usury a penal action, and adds:

"Where a statute creates a new right or offense and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive."

Barnet vs. Bank, 98 U. S., 555.

In the following year, the same Court again construed section 5198 as follows:

"The statute under which the bank was organized, known as the National Banking Act, does not declare the contract under which the usurious interest is paid, to be void.

"It denounces *no penalty* other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid. If we should declare the contract of indorsement void, and consequently, that no right of action passed to the bank on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself. 'On what principle could this Court add another to the penalties declared by the law itself?'"

Oates vs. Nat. Bank, 100 U. S. 250.

Section 5197 of the National Banking Act, fixes the rate of interest which National Banks may charge, and says that they shall take no more; and then provides a penalty for its violation.

We therefore contend that the National Banking Act and the Statutes of New Mexico are analagous in every im-

portant respect, and that therefore the cases which we have cited, deciding as to the validity of contracts under the National Banking Act, are decisive of the case at bar.

This court has not only decided that where a statute with reference to usury fixes a penalty, that that penalty is exclusive, but has extended the same rule to contracts of a different character.

This court in the case of *Fritts vs. Palmer*, 132 U. S. p. 289, in construing a prohibitory statute of Colorado, which fixed a penalty, held, that it would not add another to the penalty fixed by the Legislature. The Colorado statute provided:

"No foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members, shall purchase or hold real estate in this State, except as provided for in this act."

The statute also provided that:

"Every company incorporated under the laws of any foreign state or kingdom, or any State or Territory of the United States, beyond the limits of this State, and now or hereafter doing business within this State, shall file in the office of the Secretary of the State a copy of their charter or incorporation, etc."

The statute further provided:

"Failure to comply with the provisions of sections 23 and 24 (the sections above quoted) of this act, shall render each and every officer, agent and stockholder so failing therein, jointly and severally liable on any and all contracts of such company made within this State during the time that such corporation is so in default."

A conveyance of real estate was made to a corporation doing business in Colorado, in violation of that act, and a suit in ejectment was brought against the grantee of the corporation to recover possession of the real estate. This court in construing that statute says:

"The constitution and laws of Colorado, it should be observed, do not prohibit foreign corporations altogether from purchasing or holding real estate within its limits. They do not declare absolutely or wholly void, as to all persons, and for every purpose, a conveyance of real estate to a foreign corporation which has not previously done what is required before it can rightfully carry on business in the State. Nor do they declare that the title to such property shall remain in the grantor, despite his conveyance. So far as we are aware, the only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the State before acquiring the right to do so, is found in section 262 of the same chapter. * * * The fair implication is that, in the judgment of the legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that State. It is not for the judiciary, at the instance or for the benefit of private parties, claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others."

The cases cited by counsel for appellant where the courts have held usurious contracts absolutely void in the absence of an express declaration of the statutes under which they were decided, can be readily distinguished from the case at bar arising under the New Mexico statute.

The case of *Bank vs. Owen*, 2 Pet. 536, *Tiffany vs. Boatsman Inst.* 18 Wall. 384, and *Dill vs. Elliott*, Taney, 233, were decided under statutory provisions which simply prohibited the taking or reserving of more than a specified rate of interest, and no penalty was designated. The Supreme Court of Maryland in the case of *Baudel vs. Isaac*, 13 Md 218, expressly refused to follow the case of *Dill vs. Elliott, supra*, decided under a Maryland statute, and held that the case of *Bank vs. Owen, supra*, was overruled by *Fleckner vs. Bank*, U. S., 8 Wheaton, 354. The Supreme

Court of Maryland fully discusses this entire question and to the able reasoning of the court in that case we respectfully invite attention.

Tiffany vs. Boatman's Institution, 18 Wall. 384, has no possible application to the facts in this. The case decided in 18 Wall. 384, was a bill in equity brought by the complainant, as the assignee of one Darby, for the purpose of recovering from the defendants principal and interest which the defendants had loaned to Darby at usurious rates of interest and which Darby had repaid to them. The bill proceeds upon the theory that the defendants should repay to Darby's assignee all the money paid by Darby, as principal or interest. The Circuit Court held that one of the transactions, which was a loan of $135,000 and a repayment of that amount with interest in excess of the legal rate, was valid and that the plaintiff might recover from the defendants, not the principal sum and the legal interest, as complainant in that case insisted because the contracts were void, which would be in harmony with the contention of counsel for defendants in this case, but only the *excess* over principal and legal interest. The Circuit Court further held that the purchase of certain notes given by Darby, purchased at usurious rates were unlawful. The Supreme Court of the United States, however, in that case held with the Circuit Court as to the $135,000 transaction, but overruled the Circuit Court as to the purchase of Darby's notes, holding that such purchase was valid, reversing the case to enable the Circuit to ascertain the excess of interest over the charter rate paid on the notes. It is not necessary to point out the difference between a penal action such as this at bar and a suit in equity to recover back illegal interest voluntarily paid.

In the case reported in 2d Sawyer, 416, the Court held that the statute did not provide a fixed penalty for its violation, and that therefore the case under consideration came within the rule laid down in 2d Peters, 536.

The Court says (p. 424):

"A debtor may pay a debt tainted with usury with impunity. The law forbids the act, but prescribes no penalty for disobedience. But if payment of such a debt is sought to be enforced by a 'suit' and the fact of its being usurious is 'ascertained,' or established therein, then the law intervenes, and directs that judgment for the amount of the sum loaned be given for the benefit of the parties for whose use the suit in contemplation of law in such contingency is brought.

"The prohibition being absolute and the penalty contingent and remote, it is a question whether this is a case of both a prohibition and a penalty within the rule in *Harris vs. Runnels.* But admitting that it is, the cases are in every other material matter unlike. Here the penalty is contingent upon the action of the debtor, and is equal to the entire debt, neither more nor less."

Counsel for plaintiff in error incorrectly states the statute of Indiana, under which the case of *Fowler vs. Throckmorton*, 6 Blackford, 327, was decided.

He states that the statute prohibited the charging of more than ten per cent. interest under penalty of indictment and fine.

The statute simply prohibited the charging of interest above the rate of ten per cent., but fixed no penalty for the mere charging, and the court held that the facts brought the case directly under the rule laid down in *Owens vs. Bank*, where the act was prohibited by statute and no penalty affixed.

Moreover, the case was decided by a divided court, and especial attention is called to the very able dissenting opinion of Judge Dewey, page 330.

We have not been able to find the case of *Assurance Co. vs. Rosenthal*, 45 Ill., 85, which is quoted on page 53 of argument for plaintiff, and therefore are not able to say under what peculiar statute or circumstances the case was decided.

The cases of *Barton vs. Plank Road Co.*, 17 Barbour, 404, and *Bank vs. Lamb*, 26 Barbour, 596, were cases decided under a prohibitory statute which affixed no penalty for its violation.

It will therefore be readily observed that all these cases cited at such length by counsel for plaintiff in error, have no application to the case at bar.

The only case cited by counsel for plaintiff in error wherein a contract made in contravention of a statute prohibiting an act and also providing a penalty was held void, is the case of *Ammon vs. Miller*, *supra*, and this Court in that case held the contract to be void evidently on account of the subject matter of the legislation. Because the Court in its decision takes particular pains to refer to the subject matter of the legislation and in discussing that, says:

"Nor when we consider the subject matter of the legislation is there anything to justify a presumed intent on the part of the lawmakers to release the wrongdoer from the ordinary consequences of the forbidden act; by common consent the liquor traffic is freighted with peril to the general welfare and the necessity of careful regulation is universally conceded."

There is nothing in the case of *Ammon vs. Miller* which indicates that the court intends to overrule the long line of decisions announced by it in cases of usury. Counsel for plaintiff in error insists that the line of decisions announced by this Court in usury cases are not applicable to a case arising under the New Mexico statute, inasmuch

as the New Mexico statute makes the charging of usury an offense punishable by fine.

As we have heretofore argued we do not see how upon principle the distinction contended for can be upheld, but if there should be anything in such argument, it would not have the effect contended for by counsel.

There is one case decided by this court to which counsel for plaintiff has not referred and to which we have not heretofore referred. That is the case of *De Wolf vs. Johnson*, reported in 10th Wheat. 371. That case arose under a statute of Rhode Island, which, after prohibiting in express terms (Sec. 3) the contracting for more than 6 per cent. per annum for the loan of money, wares, goods, etc., provided (Sec. 5) page 371:

"That a sum equal to one-third of the principal, and all the interest of every bond, mortgage, specialty, agreement, contract, promise, or assurance whatsoever, which shall be made after passing of this act, for the payment of money, goods, wares, or other commodities to be lent on usury, wherein or whereby there shall be received, agreed for, or taken, for the forbearance or giving day of payment above the rate of interest expressed in the first section of this act, shall be forfeited by the creditor, one-half of such forfeiture for the use of the State, and the other half for the use of him, her or them, who will prosecute for the same. That the said forfeiture shall and may be recovered by *information*, or action of debt, before any court proper to try the same."

The statute provided that the penalty might be recovered by *information* or action of debt and that one-half the fine should go to the State and the other half to the prosecutor.

No statute could be more penal in its effect than this. Proceeding by way of information is always a criminal proceeding and is unknown to the civil law, and we do not

see how it is possible to say that the New Mexico statute was intended to be more severe than the statute of Rhode Island. The contract in that case was admittedly usurious, and it was decided by the court that the contract should be interpreted under that law of Rhode Island The court in deciding the case says (page 382):

"By the laws of the former (Rhode Island), although it is prohibited to take more than 6 per cent. interest and a *penalty* is imposed for the offence, the act does not render the contract void, certainly not for the principal sum."

But if section 1737 of the Compiled Laws of New Mexico, 1884, is to be considered alone and construed without reference to any decision, it seems to us impossible that it can be said from that section alone that the legislature of New Mexico intended that the mere charging of more than 12 per cent. interest should render the entire contract void. If such a construction is to be given to the statute, it would lead to such an absurd result, that it seems to us no reasonable person would entertain the idea.

Under such a construction the mere charging or intention to collect more than twelve per cent. interest would subject the lender to a fine of one hundred dollars, and also the forfeiture of the entire sum loaned But if the lender should go ahead and not only contract for more than twelve per cent. interest, but should actually receive the same, in addition to the original sum loaned, the only penalty which could be inflicted upon him would be the fine of one hundred dollars and a forfeiture of double the interest in excess of twelve per cent. collected. In other words, the penalty for consummation of a usurious contract would not be nearly so severe as the mere contract to take usury. Applying the statute then under this rule to the case at bar,

for the mere charging of a bonus of $6,500 the company would forfeit the entire $65,000 loaned, be subject to a fine of one hundred dollars, and according to the contention of counsel for plaintiff, also be subject to a forfeiture of $13,000. But in the event that the company not only charged usurious interest, but collected its debt, legal interest and usury, then the only penalty would be a fine of one hundred dollars and the forfeiture of the $13,000.

If the Legislature of New Mexico had intended to make void contracts made in violation of the usury law, it would undoubtedly have repealed section 1736 and declared such contracts void as it did in the repealed act of 1886.

The eloquent peroration of counsel for plaintiff in error, in which he appeals for the enforcement of the law, is indeed a classic presentation of an abstract principle of legal ethics; and when his client pays more than his legal and *honest* debt, when his client is injured by any act of the defendant, when the law has been violated, then will we join in proclaiming, "*Let the law be obeyed.*"

IV.

The trial court erred in the admission of incompetent and improper evidence, which was manifestly to the prejudice of the defendant in error.

1. The court permitted plaintiff to state that Dinkel was the agent and Vincent the attorney of defendant below without laying a foundation for such testimony. (Rec. pp. 13, 18-21.)

Brigham vs. Peters, 1 Gray, 139.
Story on Agency, 158-9.
Washington Life Ins. Co. vs. Lam., 19 Atl. Rep., 617.
1 Morawetz Corporations, 540.
1 Morawetz on Corporations, 558, 606.

2. The court permitted plaintiff below to detail at length long conversations with Dinkel as to usurious agreements, anterior in date to the loan actually made, and which were never consummated. (Rec. pp. 13-15, 41.)

3. The Court permitted plaintiff to prove orally the contents of checks and facts evidenced by writings without laying any foundation for such testimony. (Rec. pp. 15-18.)

4. The Court permitted plaintiff to detail his conversations with Dinkel, as to what he (Dinkel) had written to defendant, and what defendant had written to Dinkel, without laying any foundation for the introduction. (Rec. pp. 17–21.)

5. The Court permitted plaintiff to introduce improp-

er and illegal documentary evidence. (Rec. pp. 21–36, 52–55, 104.)

6. The Court permitted plaintiff to give in evidence that the property mortgaged to secure the note, out of which the alleged usury grew, was sold by defendant long after the commencement of this suit. Rec. pp. 48–50.)

Respectfully submitted,

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